Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KAMEHAMEHA SCHOOLS/BISHOP ESTATE,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the religious educational institution exemption in Section 702 of the Civil Rights Act of 1964 should be "narrowly construed" to exclude an educational institution that has a religious purpose and character because a federal court nonetheless deems that institution "primarily secular" rather than "primarily religious."

PARTIES TO THE PROCEEDINGS

Petitioner Kamehameha Schools/Bishop Estate has no parent corporation. It has one non-wholly owned subsidiary, Unison Pacific Investments (U.S.), Ltd., a Bermuda Corporation.

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Kamehameha Schools/Bishop Estate hereby petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-19a) is reported at 990 F.2d 458 (9th Cir. 1993). The opinion of the United States District Court for the District of Hawaii (App. 20a-43a) entered on August 1, 1991 is reported at 780 F. Supp. 1317 (D. Haw. 1991). The written determination of the Equal Employment Opportunity Commission is not published, and is included in the appendix at 44a-54a. The court of appeals' order denying petitioner's rehearing motion is not published, and is included in the appendix at 55a-56a.

JURISDICTION

The court of appeals rendered its judgment on March 31, 1993. A petition for rehearing was denied and an amended opinion issued on May 10, 1993. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), as amended, provides that it shall be unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

Section 702 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a), as amended, provides:

> This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

STATEMENT

Title VII of the Civil Rights Act of 1964, as amended, allows an educational institution to obtain a blanket exemption from the statute's ban on religious discrimination in any of three ways. First, under Section 703(e)(2), a school may obtain such an exemption by showing that its "curriculum . . . is directed toward the propagation of a particular religion," *e.g.*, because the school is a seminary or similar institution. 42 U.S.C. § 2000e-2(e)(2)(e). Second, under this same provision, a school may obtain a blanket exemption by demonstrating that it is "owned, supported, controlled, or managed

by a particular religion or by a particular religious corporation, association, or society." *Id.* Third, regardless of ownership or control by a church or religion, Section 702 of the Act allows a school to obtain such an exemption by demonstrating that it is a "religious educational institution." [1] It is this third exemption—which also applies to "religious corporations," "associations," and "societies"—that is at issue here.

In the decision below, the Ninth Circuit essentially nullified this third exemption, at least as to religious schools, by adopting what the court termed a "narrow construction." Specifically, the Ninth Circuit held that even if an educational institution has, in the words of the EEOC, " 'a religious orientation similar to that found in most church-schools,' " App. 43a (citation omitted), Section 702 nevertheless does not protect the school if a federal court deems the institution "primarily secular" rather than "primarily religious." This is a test applied to Section 702 in no other circuit. And under the Ninth Circuit's test, schools that are "primarily religious" will be effectively limited to seminaries or schools owned or controlled by a particular religion, which are fully protected by Section 703(e)(2), and therefore do not need the Section 702 exemption at all. The Ninth Circuit thus has read Section 702's "religious educational institution" exemption out of the statute.

To understand the significance of this decision, it is necessary briefly to review (1) the history and nature of petitioner Kamehameha Schools/Bishop Estate ("Kamehameha" or the "Schools"), (2) the EEOC proceedings that led to the present action, (3) the decision of the district court, and (4) the court of appeals decision.

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[1] In addition, Section 703(e)(1) allows a school (or other employer) to "hire and employ [an] employee[] . . . on the basis of his religion" if the employer can show, on a position-by-position basis, that "religion . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. 2000e-2(e)(1).

1. *Kamehameha's Religious Heritage And Practices.* Kamehameha is one of at least 300 religiously oriented schools nationwide that are neither theological seminaries nor institutions directly owned or controlled by a church or religious association.[2] Instead, Kamehameha is operated by a non-profit charitable trust established by the will of Bernice Pauahi Bishop. App. 2a. Her will requires that the trustees be Protestant,[3] and this requirement has been adhered to throughout the Schools' century-long history.

During that period Kamehameha has educated, at minimal cost to the students and their families, tens of thousands of Hawaiian children in an atmosphere permeated by the Protestant faith, in accordance with the wishes expressed in Mrs. Bishop's will. Kamehameha has always referred to itself as a Protestant school. App. 35a. To advance from grade to grade and graduate from the Schools, students must both attend and pass religious education courses each year. App. 28a. Students in kindergarten through eighth grade participate in daily prayer, and the boarding students say prayers before dinner. App. 10a. Religious influence is also present in a variety of other school activities, including the incorporation of prayer before athletic events, other meals, commencement ceremonies, and song festivals. App. 40a-41a n.6. Students are also strongly encouraged to participate in religious organizations. *Id.*

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[2] This approximate tally of religiously oriented schools that are not directly controlled or owned by specific religions relates only to colleges and universities, because data with respect to primary and secondary level educational institutions are not readily available. This figure strongly indicates that an even larger number of such religiously oriented schools at the lower levels, like the Kamehameha Schools, will be affected by the ruling of the court of appeals.

[3] The will appointed named trustees originally, and specified that later trustees shall be "persons of the Protestant religion." Will of Bernice Pauahi Bishop ¶ 14.

Kamehameha is also operated in connection with the Bishop Memorial Church, which is located at the center of campus and is a member of the Hawaii Conference of the United Church of Christ. App. 7a n.7. Boarding students are required to attend chapel each Sunday. App. 40a-41a n.6. And all students in grades 7 through 12 are required to attend a weekly devotional service in the chapel. App. 40a-41a n.6. Although the Bishop Memorial Church does not own the Schools, the Schools and the church are both owned by the same trust and managed by the same trustees.

Consistent with the pervasive Protestant influence over the activities of the Schools that Mrs. Bishop sought to create, her will also required not only that the trustees of Kamehameha be Protestant, but also that the teachers be Protestant. Both of these requirements have been strictly followed throughout the Schools' history of over a century. See App. 9a.

There can be no doubt that Protestant influence pervades all aspects of school life at Kamehameha, and this has been confirmed by myriad observers. The Hawaii Supreme Court in *Murray* v. *Kobayashi*, 431 P.2d 940 (Haw. 1967), noted that Mrs. Bishop's entire will is "permeated with expressions of her interest in the exposition of the Protestant religion" in Hawaii. App. 34a (quoting 431 P.2d at 942). Moreover, " '[i]n recognition of this interest the trustees established the Bishop Memorial Church as an integral part of the Kamehameha Schools and injected religion in the school program.' "[4] *Id.* (quoting 431 P.2d at 942).

Similarly, a planning survey of Kamehameha done in 1961 by the management consulting firm of Booz, Allen, and Hamilton found that the Schools endeavor "to educate their students in a Protestant Christian environment . . . ." The report also noted that "the objectives of the

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[4] This interpretation of a Hawaiian citizen's will by the Hawaii Supreme Court is binding on a federal court. *Roberts* v. *Lewis*, 153 U.S. 367 (1894).

religious services sponsored by [Kamehameha] are to provide a Protestant Christian atmosphere which pervades every aspect of campus life, to encourage worship, to engender an understanding and appreciation of the heritage afforded by Christianity, to provide opportunities for Christian service to others, and to give personal counselling—all for purposes of helping students to shape themselves into persons of good moral character." App. 38a (quoting Kamehameha Schools Planning Survey v.2, p.107; and v.3, p.27 (1961)). And in 1979, the EEOC itself adopted the Hawaii Department of Labor's finding that Kamehameha's Protestant-only requirement was exempted under Section 702. App. 35a.

Most important, perhaps, is how Kamehameha has chosen to define itself over the course of the past one hundred years. As the President of Kamehameha Schools has stated, "[D]aily contact with Protestant role models, prayer before meals, devotionals, required religious courses, the Bishop Memorial Church and Chapel on campus, religious programs of the school, deputation teams, and religious extra-curricular activities all speak to the degree to which religion plays a role at Kamehameha." App. 37a-38a (quoting unrebutted affidavit of Michael Chun, President of Kamehameha Schools). In sum, the Schools have steadfastly promoted the goals set forth by their founder in her will by providing education to school children in a setting that is pervasively Protestant.

2. *The EEOC Proceedings.* This case arose in 1989 when Carole Edgerton, a non-Protestant who had inquired about a teaching position in response to an advertisement, was informed of the Schools' Protestant-only requirement for teachers. App. 2a-3a. Edgerton filed a charge of discrimination with the EEOC. *Id.* Kamehameha's principal defense was that it was a "religious educational institution" under Section 702, and that it was therefore permitted to discriminate on the basis of

religion in its faculty hiring policies.[5] In support of its position, Kamehameha cited a 1979 EEOC determination in which the agency had rejected an earlier challenge to Kamehameha's Protestant-only requirement on the ground that Kamehameha was exempted under Section 702. App. 35a.

Although the Schools' essential characteristics had not changed since the EEOC's earlier determination, the EEOC this time rejected the Schools' Section 702 defense. The agency acknowledged that "[i]t is clear from the evidence submitted during the investigation of this charge that the Schools have a religious orientation that is similar to that found in most church-schools." App. 52a n.8. However, the EEOC opined that "Section 702 . . . must be narrowly construed." App. 46a. The agency then applied that provision as follows:

> [T]he Schools are not churches, or institutions like churches, and are not owned, operated or controlled by a church or religion. Consequently, the Schools do not fit within the paradigm of a "religious" institution contemplated by Congress in creating the 702 exemption to Title VII.

App. 48a (citation omitted). The agency acknowledged that, under this interpretation, the Section 702 exemption would add nothing to the exemption independently provided in Section 703(e)(2). App. 49a n.6. However, the EEOC justified this result on the novel ground that "it would be improper for this Agency to interpret the 702 exemption to provide an educational institution

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[5] Kamehameha also contended that it was entitled to the "bona fide occupational qualification" exemption of Section 703(e)(1), 42 U.S.C. § 2000e-2(e)(1) (on the ground that Mrs. Bishop's will required all Kamehameha teachers to be Protestant), and the "religious curriculum" exemption contained in Section 703(e)(2). The EEOC rejected these arguments (*see* App. 52a, 51a), the district court upheld them (*see* App. 43a, 32a), and the Ninth Circuit rejected them (App. 4a). Kamehameha has elected not to press these arguments before this Court.

with a bigger loophole to Title VII coverage than was contemplated by Congress in 703(e)(2)." *Id.*

3. *The District Court's Decision.* The EEOC filed suit in the United States District Court for the District of Hawaii, alleging that the Schools' conduct violated Title VII's ban on religious discrimination in employment. See 42 U.S.C. § 2000e-2(a). Both parties filed cross-motions for summary judgment, which were limited to the question whether Kamehameha fell within any of the existing statutory exemptions to Title VII's prohibition on religious discrimination. App. 21a. As it had done in its own written determination, the EEOC again argued that a religiously oriented school may not receive an exemption under Section 702 unless the school also falls within Section 703(e)(2). App. 34a n.5.

The district court rejected the EEOC's argument. *Id.* Instead, based upon stipulated and uncontested facts, the district court found that Kamehameha was entitled to a religious educational exemption under Section 702, and therefore granted petitioner's motion for summary judgment.

In analyzing and applying Section 702 to Kamehameha, the court found that Kamehameha "has *a* religious purpose and character," which the court deemed sufficient to invoke the Section 702 exemption. App. 37a (emphasis added). The district court relied for this conclusion upon the following undisputed facts:

> (1) All trustees for the 104-year life of the schools have been Protestant;
>
> (2) Mrs. Bishop desired . . . the children to be instructed in morals by Protestants;
>
> (3) . . . "A review of the record clearly shows that [Kamehameha] and the Bishop Memorial Church are operated by the trustees in connection with one another" [quoting the Hawaii Supreme Court in *Murray* v. *Kobayashi*, 431 P.2d 940, 942 (Haw. 1967)].
>
> * * * *

> (6) [Kamehameha] refers to itself as a Protestant school . . . .
>
> (7) [Kamehameha] is a non-profit institution;
>
> (8) There has been an unbroken chain of over 100 years of mandatory devotional services, religious education requirements, and prayers at [Kamehameha]; and
>
> (9) EEOC found in its determination in the underlying claim that [Kamehameha] has a " 'religious orientation similar to that found in most church-schools' " [citation omitted].

App. 34a-35a. Moreover, the district court expressly found that "if the Protestant-only requirement was not maintained, it would be reasonable to believe that the educational experience would be significantly different." App. 28a. The district court rejected the EEOC's contention that Kamehameha's religious purpose and character were negated by, among other things, the fact that it was "owned, controlled, and supported by a secular estate" rather than a church, and that the Schools provide a "secular" education to their students in addition to religious training. App. 36a.

4. *The Decision Of The Ninth Circuit.* The court of appeals reversed. It began by holding that all of Title VII's "statutory exemptions," including Section 702's religious educational institution exemption, are to be "construe[d] narrowly." App. 4a. The court contended that "Congress's conception of [§ 2000e-1] was not a broad one. All assumed that only those institutions with extremely close ties to organized religion would be covered." App. 5a (quoting *EEOC* v. *Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988)). The court, however, cited no support in Title VII's language or legislative history for this argument.[6]

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[6] Indeed, the court claimed that its conclusion did "not depend on an analysis of legislative history." App. 5a n.5.

The court determined that the appropriate way to construe Section 702 narrowly was to employ the "primarily religious/primarily secular" test previously applied in the Ninth Circuit to Section 702's "religious corporation" exemption. App. 5a. Under the Ninth Circuit's test, an organization can claim an exemption under Section 702 only if the court determines that the institution is "*primarily* religious," but not if the court determines it is "primarily secular."

Analyzing the facts found by the district court in light of its legal test derived from the "narrow construction" of Section 702, the court of appeals concluded that "the general picture of the Schools reflects a primarily secular rather than a primarily religious orientation." App. 6a-7a. The court did not dispute any findings of fact upon which the district court had based its conclusion. Rather, the Ninth Circuit's conclusion was based principally upon (a) the fact that "[n]o religious organization has ever controlled or supported the Schools" (App. 7a); (b) the fact that Kamehameha had "explicitly disavowed any effort to convert non-Protestant students" (App. 10a); and (c) the fact that Kamehameha "offer[s] a complete array of courses in math, science, English, languages, and social studies, all of which are taught from a secular perspective" (App. 10a). Moreover, after carefully reviewing the content of Kamehameha's mandatory religious instruction, the Ninth Circuit dismissed that instruction as consisting of "largely comparative religious studies." App. 12a. The court likewise denigrated all remaining religious characteristics identified by the district court.

REASONS FOR GRANTING THE PETITION

It has been six years since this Court last decided a case involving Section 702's religious exemption; that case was *Corporation of the Presiding Bishop* v. *Amos,* 483 U.S. 327 (1987). There, the exemption faced a challenge from private plaintiffs who sought to have it declared unconstitutional under the Establishment Clause.

The Court rightly rejected that challenge. Here, the exemption faces a more subtle but equally devastating challenge from the EEOC and the Ninth Circuit, both of which seek to limit severely the reach of Section 702 in a manner that was not intended by Congress.

The decision below is fundamentally wrong as a matter of law. But the decision is not only wrong; it also warrants review for both its legal and practical implications. First, in the decision below, the Ninth Circuit has placed itself squarely in conflict with the Third and Fifth Circuits on an issue fundamental to the proper interpretation of Section 702: whether the "religious educational institution" exemption, and Section 702 generally, should be interpreted "narrowly" or "broadly." The importance of this conflict over the appropriate rule of construction is starkly illustrated by the fact that, in this case, the Ninth Circuit's "narrow" construction essentially nullifies Section 702's "religious educational institution" exemption by limiting it to those schools that independently qualify for an exemption under Section 703(e)(2).

Second, the Ninth Circuit's "primarily religious/primarily secular" test requires the EEOC and the courts to make the very kinds of intrusive, "entangling" inquiries into religious matters that this Court has said should be avoided whenever possible, and which, as this Court noted in *Amos,* the framers of Section 702 specifically sought to avoid. See 483 U.S. at 339. Over time, this ruling will ensure that such schools—which, at the post-secondary level,[7] number at least 28 in the Ninth Circuit and 300 nationwide—either will act to increase the amount of religious activity within the schools solely in order to comply with a court's "primarily religious" requirement, or, conversely, will completely lose their religious character as Title VII operates to eliminate all religious preferences within the institutions. Either way,

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[7] *See supra* note 2.

the religious nature of a private educational institution will be dictated more by vague federal judicial standards than by the school's legitimate desire to define its own mission. Review by this Court therefore is required to ensure that Section 702 is not used as a vehicle for judicial supervision of religion in private schools, the ultimate effect of which would be to transform the very nature of such educational institutions.[8]

1. The linchpin of the Ninth Circuit's decision—as well as that of the EEOC—was the holding that the exemptions contained in Section 702 must be "construe[d] narrowly." App. 4a. It was on this basis that the court held that an institution must be "primarily religious" and not just "religious" in order to invoke the protection of Section 702. App. 5a. And it was on this basis that the Ninth Circuit disagreed with the district court's analysis of the facts: In contrast to the district court, the approach of the Ninth Circuit required it to "evaluat[e] the facts of this case in light of Congress' intention as to the [narrow] scope of the exemption." *Id.* In short, it was the Ninth Circuit's "narrow construction" of Section 702 that led it to adopt its "primarily religious/primarily secular" test, which in turn led the court to conclude that Kamehameha cannot invoke Section 702's exemption here.

For the same reason, it is clear that the outcome would have been different in either the Third or the Fifth Circuit, both of which have squarely held that Section 702 should be construed "broadly." In *Little* v. *Wuerl*, 929 F.2d 944 (3d Cir. 1991), for example, the Third Circuit

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[8] Indeed, the Ninth Circuit's ruling will require Kamehameha to make fundamental changes in its operations. Therefore, the proper interpretation of Section 702 is an issue that "should receive the attention of this Court before . . . a national institution as venerable as the [Kamehameha Schools] is compelled to transform itself" and to abandon its essential character maintained since the Bishop Estate was probated more than one hundred years ago. *Virginia Military Inst.* v. *United States*, 113 S. Ct. 2431 (1993) (op. of Scalia, J.).

held that Section 702 protects a decision of a Catholic school to discriminate against a non-Catholic, not because of her membership in another faith, but "because her conduct does not conform to Catholic mores." *Id.* at 945. The Third Circuit reviewed the legislative history of the religion-based exemptions to Title VII, and concluded that "those exemptions reflect a decision by Congress . . . [that religious organizations should] be free from government intervention." *Id.* at 951. Specifically, the court reasoned:

> [We] are . . . persuaded that Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's "religious activities." Against this background and with sensitivity to the constitutional concerns that would be raised by a contrary interpretation, *we read the exemption broadly.*

Id. at 951 (emphasis added). In contrast, the decisions of the Ninth Circuit and the EEOC have now made it impossible for educational institutions that are not owned or controlled by a church or organization of churches to "create and maintain communities composed solely of individuals faithful to their doctrinal practices," unless a federal court independently concludes that the institution is "primarily religious."

Similarly, in *EEOC* v. *Mississippi College,* 626 F.2d 477 (5th Cir. 1980), the Fifth Circuit held that "the exemption granted to religious institutions by § 702 . . . *must be construed broadly* to exclude from the scope of the act any employment decision made by a religious institution on the basis of religious discrimination." *Id.* at 487. Accordingly, the Fifth Circuit held that a finding that Section 702 applies "deprives the EEOC of jurisdiction to investigate further to determine whether the reli-

gious discrimination was a pretext for some other form of discrimination." *Id.* at 485. The court further noted that "[t]his interpretation of § 702 is required to avoid the conflicts that would result between the rights guaranteed by the religion clauses of the first amendment and the EEOC's exercise of jurisdiction over religious educational institutions." *Id.* (citing *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500-02 (1979)).

Although *Little* and *Mississippi College* involved the interpretation of different phrases in Section 702 than the phrase ("religious educational institution") specifically at issue here, the conflict could hardly be more stark: The decision below held that the entire provision must be "construe[d] narrowly," while both *Little* and *Mississippi College* expressly held that the entire provision must be "broadly construed." Given the fact that the Ninth Circuit did not disagree with the district court's findings of fact, there can be little doubt that a "broad construction" of Section 702 by the Ninth Circuit would have compelled a conclusion on these facts that Kamehameha is indeed a "religious" institution. Certainly, if it had applied the standard used in the Third and Fifth Circuits, the court of appeals would never have had to engage in its subjective, intrusive analysis of Kamehameha's religious characteristics to determine whether Kamehameha is entitled to the protections of Section 702.

The Ninth Circuit's view that Section 702 must be "narrowly construed" is fundamentally wrong in light of this Court's consistent teaching that, especially where issues of religious freedom are concerned, statutes should be construed to avoid " 'serious doubt of [their] constitutionality.' " *NLRB* v. *Catholic Bishop, supra*, 440 U.S. at 500 (quoting *Machinists* v. *Street*, 367 U.S. 740, 749 (1961)). See also *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.). As the Fifth Circuit noted in *Mississippi College*, a narrow interpretation of Section 702's religious exemption

heightens the risk of a conflict between religious freedom and enforcement of Title VII, while a broad construction, such as that endorsed by the Third and Fifth Circuits, reduces this risk. And a broad construction also more effectively promotes Congress' intent to accommodate religious preferences by institutions that are religious in nature. See *Amos*, 483 U.S. at 335 (recognizing that Section 702's purpose was "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions"). The Ninth Circuit's "narrow construction" is especially troubling because it affects *all* of the religious exemptions provided by Section 702, not just the "educational institution" exemption.

Moreover, the erroneousness of the Ninth Circuit's "narrow construction" canon is made plain in light of the harm that interpretation does to the entire statutory scheme. Specifically, the court's opinion indicates that, to pass the "primarily religious" test, an institution would have to be either (a) owned or controlled by a church or religion, or (b) the functional equivalent of a theological seminary. But in that event, the school could simply claim one of the separate exemptions in Section 703(e)(2). There would be no need to invoke Section 702.

For all of these reasons, this Court should grant certiorari to resolve the fundamental conflict among the circuits over the appropriate rule of construction in interpreting Section 702.

2. The decision below also warrants this Court's review because the test that the Ninth Circuit adopted as a result of its narrow construction of Section 702—its "primarily religious/primarily secular" test—requires, for any exemption under Section 702, that courts and the EEOC make extremely intrusive inquiries into religious matters. These are precisely the kinds of inquiries that this Court's decisions have consistently cautioned against, and which,

as the Third and Fifth Circuits recognized, Section 702 was designed to avoid. By its terms, the Ninth Circuit's test requires two distinct inquiries, each of which is constitutionally problematic: first, " '[a]ll significant religious and secular characteristics' " of the institution and its program must be identified; second, these characteristics " 'must be weighed to determine whether the corporation's purpose and character are primarily religious' " or secular. App. 5a (citation omitted).

The first inquiry plainly runs afoul of this Court's consistent teaching that "determining whether an activity is religious or secular . . . results in considerable ongoing government entanglement" with matters of religion. *Amos, supra*, 483 U.S. at 343 (Brennan, J., concurring in the judgment) (citing *Lemon* v. *Kurtzman*, 403 U.S. 602, 613 (1971)). Accordingly, this Court has frequently construed statutes to avoid the necessity for such inquiries, and has required other courts and public officials to avoid them as well. *E.g., Catholic Bishop, supra*, 440 U.S. at 496 (quoting with approval statement by court of appeals that "factual inquiry by courts or agencies into such matters [separating secular from religious training] would almost necessarily raise First Amendment problems"); *Hernandez* v. *Commissioner*, 490 U.S. 680, 694 (1989) (construing provision of Internal Revenue Code to avoid requiring "the IRS and reviewing courts to differentiate 'religious' benefits from 'secular' ones"); *Aguilar* v. *Felton*, 473 U.S. 402, 413 (1985) (invalidating federal aid program to religious schools in part because program presented entanglement problems inherent in government evaluation of "subtle or overt presence of religious matter" in the classes); *Fowler* v. *Rhode Island*, 345 U.S. 67, 69 (1953) ("[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment").[9] The basis for these decisions was well

[9] *See also Widmar* v. *Vincent*, 454 U.S. 263, 272 n.11 (1981) (noting that school's decision not to exclude religious worship and

stated in *Gillette* v. *United States*: " 'the more discriminating and complicated the basis of classification for an exemption—even a neutral one—the greater the potential for state involvement' in determining the character of [religious] beliefs and affiliations, thus 'entangl[ing] government in difficult classifications of what is or is not religious.' " 401 U.S. 437, 457 (1971) (quoting *Walz* v. *Tax Commission*, 397 U.S. 664, 698-99 (1970)).

Indeed, the first step of the Ninth Circuit's test not only violates these key judicial principles, but also is contrary to the congressional intent underlying Section 702, as interpreted in *Amos*. As Justice O'Connor explained, Section 702 represents "a government decision to lift from a nonprofit activity of a religious organization the burden of demonstrating that the particular nonprofit activity is religious as well as the burden of refraining from discriminating on the basis of the religion." 483 U.S. at 348-49 (O'Connor, J., concurring in the judgment). And the majority opinion in *Amos* stated that one of the purposes of that provision was to "avoid[] the kind of intrusive inquiry into religious belief that the District Court engaged in in this case." *Id.* at 339. Like the court of appeals here, the district court in *Amos* had undertaken an exhaustive inquiry into whether certain practices and functions of a gymnasium owned and operated by the Church of Jesus Christ of Latter-day Saints were "religious" or "secular." See *id.* at 331-32 The Ninth Circuit's requirement that a reviewing court engage in a searching analysis to determine which aspects of an institution are religious and which are secular thus violates this Court's fundamental teachings.

The second step of the Ninth Circuit's analysis—weighing religious and secular features to determine whether the institution is "primarily religious"—is equally and independently inappropriate under *Catholic Bishop*.

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speech from campus facilities was justified by, among other things, the school's legitimate desire to avoid the entanglement entailed in determining which activities and speech are "religious").

There, in an effort to avoid constitutional difficulties, this Court interpreted the NLRA not to extend the jurisdiction of the NLRB to church-operated schools. In so doing, the Court rejected the NLRB's attempted distinction between schools that were "completely religious" and those that were merely "religiously associated." See 440 U.S. at 499. The Court observed that this distinction was itself an admission by the NLRB that its policy constituted "some degree of entanglement" in religious affairs. *Id.* And the Court quoted with approval the following statement by the court of appeals: "The determination that an institution is so completely a religious entity as to exclude any viable secular components obviously implicates very sensitive questions of faith and tradition." *Id.* at 495.

The same is true of the Ninth Circuit's attempt to weigh the institution's "religious" and "secular" features against one another to determine whether the institution is "primarily religious" or "primarily secular." Indeed, the intrusiveness of the Ninth Circuit's test is demonstrated by the court's analysis of the district court's findings of fact concerning the Kamehameha Schools. For example, in order to conclude that Kamehameha is "primarily secular," the court found it necessary (a) to denigrate Kamehameha's religious instruction as consisting of "largely comparative religious studies" (App. 12a); (b) to question Kamehameha's commitment to its Protestant mission by virtue of the Schools' lack of overt proselytization toward non-Protestant students [10] (App. 10a) and its failure to police the religious orthodoxy and conduct of its faculty (App. 9a); and (c) generally to minimize the significance and importance of Kamehameha's "religious characteristics" (App. 12a). Any "test" that requires such value-laden, patronizing judgments about an institution's religious prac-

[10] The court of appeals seemed oblivious to the implication of its argument that in order for Kamehameha to obtain the fundamental protection intended by Title VII, it must engage in greater efforts at proselytization. It is difficult to imagine a more jarring entanglement of church and state than judicially encouraging a private school to adopt a program of converting students to Protestantism.

tices plainly fosters an intolerable degree of entanglement between government and religion.

In sum, this Court should grant certiorari to ensure that the lower federal courts do not improperly become embroiled in entangling disputes about the quality and scope of religious instruction and practices of institutions seeking to claim an exemption under Section 702. Because such entanglements are avoided by the legal standards followed in the Third and Fifth Circuits, but are inevitable under the holding of the Ninth Circuit in this case, review by this Court is essential to ensure uniformity in the interpretation of this vital provision of Title VII.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 91-16586

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

KAMEHAMEHA SCHOOLS/BISHOP ESTATE,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Hawaii

Argued and Submitted Nov. 5, 1992

Decided March 31, 1993

As Amended on Denial of Rehearing
May 10, 1993

Samuel A. Marcosson, E.E.O.C., Washington, DC, for plaintiff-appellant.

James Kawashima and Cynthia Winegar, Watanabe, Ing & Kawashima, Honolulu, HI, for defendant-appellee.

Before BROWNING, NORRIS and REINHARDT, Circuit Judges.

JAMES R. BROWNING, Circuit Judge:

I. *Overview.*

Bernice Pauahi Bishop was a member of the Hawaiian royal family and, at the time of her death in 1884, the largest landowner in Hawaii. Mrs. Bishop's will provided that the bulk of her estate should be placed in a charitable trust "to erect and maintain in the Hawaiian Islands two schools, each for boarding and day scholars, one for boys and one for girls, to be known as, and called the Kamehameha Schools." Mrs. Bishop's will also directed that "the teachers of said schools shall forever be persons of the Protestant religion." [1]

Carole Edgerton, who is not a Protestant, contacted the Schools to apply for an advertised position as a substitute French teacher. Edgerton was informed of the Protestant-only requirement and filed a charge of religious

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[1] The provision reads:

> I give, devise and bequeath all of the rest, residue and remainder of my estate . . . unto the trustees below named . . . to erect and maintain in the Hawaiian Islands two schools, each for boarding and day scholars, one for boys and one for girls, to be known as, and called the Kamehameha Schools. . . . I direct my trustees . . . to expend the annual income in the maintenance of said schools . . . and to devote a portion of each year's income to the support and education of orphans, and others in indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood. . . . I desire my trustees to provide first and chiefly a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women; and I desire instruction in the higher branches to be subsidiary to the foregoing objects. . . . I also give unto my said trustees full power to make all such rules and regulations as they may deem necessary for the government of said schools and to regulate the admission of pupils. . . . I also direct that the teachers of said schools shall forever be persons of the Protestant religion, but I do not intend that the choice be restricted to persons of any particular sect of Protestants.

discrimination with EEOC. EEOC attempted conciliation, but the Schools informed the Commission they were bound by Mrs. Bishop's will.

EEOC filed suit, alleging religious discrimination in employment in violation of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).[2] The Schools conceded Mrs. Bishop's will requires discrimination in employment contrary to § 2000e-2(a)(1), but sought to bring themselves within three exemptions provided elsewhere in the Act: (1) § 2000e-1, which provides that the equal employment provisions of the Act do not apply to employment by a "religious . . . educational institution" of individuals of a particular religion to carry on its activities; (2) § 2000e-2(e)(1), which provides that "it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [] religion" if religion is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise;" and (3) § 2000e-2(e)(2), which provides that "it shall not be an unlawful employment practice for a school . . . to hire and employ employees of a particular religion . . . if the curriculum of such school . . . is directed toward the propagation of a particular religion."

The parties agreed to litigate the applicability of the three exceptions before considering the merits of Edgerton's claim. EEOC and the Schools filed cross-motions for summary judgment. The district court found the Schools exempt on all three grounds. *EEOC v. Kamehameha Schools/Bishop Estate*, 780 F.Supp. 1317 (D. Haw.1991).

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[2] 42 U.S.C. § 2000e-2(a)(1) provides:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

Ordinarily, "[w]e review the district court's grant of summary judgment *de novo.*" *EEOC v. Townley Eng. & Mfg. Co.*, 859 F.2d 610, 613 (9th Cir.1988). However, here we are reviewing, at least in part, conclusions of ultimate fact reached by a district court when granting summary judgment in a non-jury case. We need not decide whether a different standard of review applies with respect to such conclusions; the result would be the same whether we applied a *de novo* or clearly erroneous standard.

We construe the statutory exemptions narrowly, *Korherr v. Bumb,* 262 F.2d 157, 162 (9th Cir.1958), and the Schools bear the burden of proving they are exempt, *see United States v. First City Nat'l Bank,* 386 U.S. 361, 366, 87 S.Ct. 1088, 1092, 18 L.Ed.2d 151 (1967) (party seeking benefit of exemption from statute bears burden of proof); *EEOC v. Boeing Co.,* 843 F.2d 1213, 1214 (9th Cir.1988) (party seeking benefit of bona fide occupational qualification exception bears burden of proof).

We conclude the Schools failed to establish their entitlement to any of the three exemptions claimed, and reverse.

II. *Exemption for Religious Educational Institutions.*

The district court weighed the religious characteristics of the Schools against their secular characteristics and concluded the Schools were exempt under § 2000e-1 as religious educational institutions because the purpose and character of the School is primarily religious.[3] 780 F.

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[3] 42 U.S.C. § 2000e-1 reads:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, *educational institution,* or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. (emphasis added)

Supp. at 1324-26. In applying § 2000e-1 the district court adopted the approach approved by this court in *Townley*, 859 F.2d at 618, of weighing "[a]ll significant religious and secular characteristics . . . to determine whether the corporation's purpose and character are primarily religious." We reaffirm that approach. We differ from the district court only in evaluating the facts of this case in light of Congress' intention as to the scope of the exemption for religious organizations.

We stated in *Townley* that § 2000e-1 does not exempt an institution that is "merely 'affiliated' with a religious organization." *Id.* at 617. We also observed, "Congress's conception of the scope of [§ 2000e-1] was not a broad one. All assumed that only those institutions with extremely close ties to organized religion would be covered. Churches, and entities similar to churches, were the paradigm." *Id.* at 618.[4] We then held that, in determining whether an institution falls within the limited exemption for religious institutions under § 2000e-1, "each case must turn on its own facts. All significant religious and secular characteristics must be weighed to determine whether the corporation's purpose and character are primarily religious. Only when this is the case will the corporation be able to avail itself of the exemption." 859 F.2d at 618. "Our inquiry here," we said, "is to determine whether the 'general picture' of the institution is primarily religious or secular." *Id.* at 619 n. 14.[5]

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[4] Specific exemptions for schools, owned, supported, controlled, or managed by a particular religion, or whose curricula are dedicated toward the propagation of a particular religion were included in the original statute because of the perceived narrowness of the exemption for religious corporations in § 2000e-1. *See* 42 U.S.C. § 2000e-2(e)(2); *Townley*, 859 F.2d at 617.

[5] *Townley* relied in part on an examination of the legislative history of the original version of § 2000e-1, which contained separate exclusions for (1) religious discrimination relating to the religious activities of a religious corporation, association, or society,

The ownership and affiliation, purpose, faculty, student body, student activities, and curriculum of the Schools are either essentially secular, or neutral as far as religion is concerned,[6] and we conclude the general picture of

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and (2) discrimination on any basis relating to the educational activities of an educational institution. *Townley* did not discuss the legislative history of the 1972 amendments to § 2000e-1, which eliminated the separate exemption for educational institutions, added "religious . . . educational institutions" to the list of exempt religious organizations, and expanded the religious exemption to include employees engaged in non-religious activities. However, nothing in the 1972 legislative history causes us to question the approach the court adopted in *Townley*. These materials suggest only that Congress felt strongly that the exemption that had been available to all educational institutions should be narrowed to religious discrimination by religious educational institutions, but that religious institutions, including religious schools, should be allowed to discriminate on the basis of religion in all their activities. *See, e.g.*, H.Rep. No. 238, 92nd Cong., 1st Sess. (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2155, and Bureau of National Affairs, *The Equal Employment Opportunity Act of 1972* 155, 173 (1973); S.Rep. No. 415, 92nd Cong., 1st Sess. (1971), *Equal Employment Opportunity* at 225, 235-36; 118 Cong. Rec. 946 (Jan. 24, 1972) (statement of Sen. Allen, sponsor of amendment to allow religious organizations to discriminate on basis of religion in all their activities), *Equal Employment Opportunity* at 335; *id.* at 4941 (Feb. 22, 1972) (section by section analysis of Senate bill by Sen. Williams, sponsor of the bill), *Equal Employment Opportunity* at 314. It would frustrate this purpose in part to allow educational institutions with limited religious ties to gain exemption as "religious educational institutions."

In any event, the test the court adopted in *Townley* does not depend on an analysis of legislative history. Although the statute does not define the term "religious educational institution," it is clear from its context that, at least where the school is not owned by a church, the courts must determine in each case whether a particular educational institution is a religious organization. Therefore the case by case inquiry described in the text is the appropriate method for determining whether § 2000e-1 applies to the Schools.

[6] The record does not disclose many details about the administration of the Schools. Mrs. Bishop's will requires that the trustees be Protestants, and grants the power of appointing them to the justices of the Hawaii Supreme Court. There is no requirement that other administrative positions be filled by Protestants, and there is nothing

the Schools reflects a primarily secular rather than a primarily religious orientation.

1. *Ownership and Affiliation*—No religious organization has ever controlled or supported the Schools, and the Schools are not affiliated with any denomination of Protestants or with any organization or association of religious schools.[7] The Schools are a part of the Bishop Trust, which is a large and overwhelmingly secular business. Recent annual reports for the Bishop Estate make no mention of religion. Recent annual reports by the

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in the record to indicate that the Schools' administration reflects a Protestant perspective, or has organized the Schools so as to promote Protestant beliefs. Indeed, the record reveals recent generations of administrators have shifted the focus of the Schools away from promoting religion.

[7] The Schools maintain a cooperative relationship with the Bishop Memorial Church, which receives financial support from the Bishop Estate and is a member of the Hawaii Conference of the United Church of Christ. However, the Schools themselves are not affiliated with the Church of Christ, and the parties stipulated that no Protestant denomination, including the Church of Christ, "owns, supports, controls or manages, in whole or significant part, the Bishop Estate or the Kamehameha Schools."

In view of the narrow reach of the § 2000e-1 exemption, it is not surprising that we have found no case holding the exemption to be applicable where the institution was not wholly or partially owned by a church. *See Little v. Wuerl*, 929 F.2d 944 (3d Cir.1991) (parochial school operated by parish); *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir.1986) (school wholly owned and operated by Assembly of God Church); *Rayburn v. Gen. Conf. of Seventh Day Adventists*, 772 F.2d 1164 (4th Cir.1985) (sex discrimination by a church); *EEOC v. Pacific Press Pub. Ass'n*, 676 F.2d 1272 (9th Cir.1982) (affiliated with and overseen by Seventh Day Adventist Church; published only religious materials); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. Unit A 1981) (owned and operated by Southern Baptist Convention); *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir.1980) (owned and operated by Mississippi Baptist Convention); *see also Fike v. United Methodist Children's Home of Va., Inc.*, 547 F.Supp. 286 (E.D.Va. 1982) (exemption does not apply because the home had abandoned its sectarian orientation and become a secular organization even though it was affiliated with the Methodist Church).

Schools to the trustees mention religion only as a form of "ancillary support." [8]

2. *Purpose*—In the advertisement for a substitute French teacher that gave rise to this litigation, the Schools described themselves as "Protestant." However, the record reveals the purpose and emphasis of the Schools have shifted over the years from providing religious instruction to equipping students with ethical principles that will enable them to make their own moral judgments. A 1955 School Survey Report lauded the "aim of developing in the students an attitude of worship and reverence." By 1961, the Schools' Introductory Pamphlet described religion as "a powerful influence for the stabilizing of personality," and asserted religious education at the Schools "seeks to provide an atmosphere in which young people accept as their own the finest ideals of conduct; and in cases where problems have arisen, to show moral and spiritual standards by which the students can set up inward guidance to correct their problems." The 1989-90 Course Catalog states each student "will be expected to develop to the best of his or her ability, skills needed to relate positively to self and others, maintain health, continue learning, enrich existence and participate in contemporary society for a rewarding and productive life." Students should "[d]efine a system of values which reflects positive feelings about

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[8] Because the Schools are chartered as a nonprofit educational institution, not as a religious organization, EEOC argues the Schools represent themselves as secular to receive federal funding for off-campus programs. Congress apparently did not intend that an institution's charter should carry much weight in determining whether an institution is religious. *See* 110 Cong.Rec. 2585 (Feb. 8, 1964) (statement of Rep. Purcell) ("most church-related schools are chartered under the general corporation statutes as nonprofit institutions for the purpose of education"), *reprinted in* EEOC, *Legislative History of Titles VII and XI of Civil Rights Act of 1964* 3197 (1968); *see also Pime v. Loyola Univ. of Chicago*, 803 F.2d 351, 358 (7th Cir.1986) (Posner, J., concurring).

self and others and awareness of the rights and responsibilities of the individual within society." [9]

3. *Faculty*—The Schools have consistently adhered to the Protestant-only requirement for on-campus teachers, although there is no religious requirement for teachers in off-campus programs. Until 1988, the Schools required prospective teachers to present a baptismal record or letter of membership reflecting affiliation with a Protestant church, but now require only that teachers certify their "membership in the Protestant religion." The Schools have never required their teachers to maintain active membership in a church, and do not inquire into the substance of a teacher's beliefs or the extent to which teachers integrate those beliefs into their work. Of the two hundred and fifty full-time on-campus faculty members, only three, including the Chaplain, have specific religious teaching duties. The Chaplain teaches religious education and serves as pastor of the Bishop Memorial Church, which is located on campus in a structure owned by the Schools. With the exception of religious education, the Chaplain has no authority over the curriculum.

4. *Student Body*—The Schools enroll more than 3,000 boarding and day students in kindergarten through twelfth grade; more than two-thirds of whom attend grades seven through twelve. The Schools operate off-campus programs for more than 16,000 additional students and administer community outreach programs for another 20,000 Hawaiians. The Schools do not consider the religious affiliation of prospective students on or off campus, or of the persons participating in outreach programs. Less than one-third of the "on-campus" students are Protestants.

5. *Student Activities*—Students participate in a wide variety of activities, including interscholastic athletics, canoe and weightlifting clubs, the Future Secretaries As-

[9] We discuss the purpose of the Schools in further detail in section IV, *infra*.

sociation, and French Club. As at public and private schools across the nation, students may participate in Bible studies, or become members of the Fellowship of Christian Athletes and Young Life (an inspirational society for high school students).

Some official school activities have religious overtones. Teachers in kindergarten through eighth grade lead their classes in a daily prayer, and all boarders say grace before dinner. Athletic teams pray before games, and the School's daily bulletin usually reprints a Bible verse. The Bishop Memorial Church holds services every Sunday during the school year which all boarding students must attend (however, no students and only nineteen of faculty were members of the church during the 1988-89 school year). The Chaplain and the church coordinate "deputation teams" of students from the Schools who lead services several times a year on other islands, although the number of students and the number of visits has decreased over the years. Other mandatory school functions—such as Founder's Day, Baccalaureate, and Graduation—include prayer and hymns in addition to celebrations of Hawaiian culture. Another mandatory function—the Song Contest—seeks "to build up the repertoire of the best in Hawaiian music for the cultural heritage of any student who attends Kamehameha."

6. *Curriculum*—The Schools describe themselves as "a comprehensive school" with "programs in vocational, business, and college preparatory fields." They offer a complete array of courses in math, science, English, languages, and social studies, all of which are taught from a secular perspective. No effort is made to instruct students in Protestant doctrine, and the Schools have explicitly disavowed any effort to convert non-Protestant students. However, the Schools require each student to fulfill a limited religious education requirement, as described below.

Religious instruction in kindergarten through sixth grade is provided by a religious education teacher and

consists of Bible stories, religious songs, and prayer for 15-30 minutes once a week for one semester. The present teacher describes her work as "an important opportunity to expose children to the Christian faith. The emphasis is not on any 'religion' but to teach the basic truths about how God and through his son Jesus Christ teaches us how to live a joyous and fulfilling life."

Religious education in the upper grades exposes students to the comparative study of religions, and to the place religion has held in Hawaiian culture and history. Seventh and eighth graders spend 10-14 hours a year in religious education classes. The single course offered to seventh grade students is described as involving an examination of "The Nature of 'God,'" "The Nature of Man," and "The Nature of Religion." The course description defines "God" as "the center, focus and object of any belief system, whether person, idea or spirit," and defines "religion" as "a structure that attempts to overcome the separation between Man and 'God,' and to teach man how this can be achieved." The eighth grade course explores the historical development and beliefs of "Hinduism, Buddhism, Judaism, Christianity and Islam."

High school students must complete the requirements of the "Ekalesia" program, which includes coursework and mandatory attendance at devotional services every other week.[10] In 1988-89, the course included study of "the Kumulipo, the Hawaiian creation chant, . . . [with] a comparative look at the creation chants of other religions," and an "historical study approach to three major Christian faiths [Congregationalism, Catholicism, and the Church of Jesus Christ of Latter-Day Saints] that have impacted on the Hawaiian people and the Hawaiian society today." In 1987-88 students studied "the Hawaiian

[10] In 1988-89, students were expected to complete one quarter of Ekalesia coursework each year. The Schools modified the coursework component in 1989-90 so that only freshmen were required to complete one quarter of coursework, although all students were still required to attend devotions. The record does not disclose the form or content of the devotional services.

and Christian heritage" of the Schools, and examined "the Congregational missionaries and their impact upon the life and culture of the Hawaiian Kingdom." In addition to "Ekalesia," the Schools offer high school students an elective class on the Bible as literature.

* * * *

In sum, the religious characteristics of the Schools consist of minimal, largely comparative religious studies, scheduled prayers and services, quotation of Bible verses in a school publication, and the employment of nominally Protestant teachers for secular subjects. References to Bible verses, comparative religious education, and even prayers and services are common at private schools and cannot suffice to exempt such schools from § 2000e-1; the addition of nominally Protestant teachers does not alter this conclusion. We conclude the Schools are an essentially secular institution operating within an historical tradition that includes Protestantism, and that the Schools' purpose and character is primarily secular, not primarily religious.[11]

III. *Religious Curriculum Exemption*

The curriculum exemption in 42 U.S.C. § 2000e-2(e)(2) provides:

> it shall not be an unlawful employment practice for a school . . . to hire and employ employees of a particular religion . . . if the curriculum of such school . . . is directed toward the propagation of a particular religion.

The district court ruled the Schools satisfied the requirements of this section because " 'religion . . . is an integral part of the child's daily life' " at the Schools. 780 F. Supp. at 1327 (quoting EEOC Decision 75-186 (1975), *reprinted in* 1983 EEOC Decisions ¶ 6553, at 4356).

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[11] The Schools contend we should consider prior decisions by EEOC regional offices not to charge the Schools with religious discrimination. However, the Schools concede these decisions do not estop EEOC, and there is no indication the regional offices had the benefit of the record compiled during this litigation.

We turn first to the language of § 2000e-2(e)(2). The statute does not define "propagate" or "curriculum," but in the context of § 2000e-2(e)(2) and in light of their ordinary meanings, "propagate" carries at least the general meaning of spreading or instilling particular religious values, while "curriculum" is limited to coursework and required school activities.[12]

Sec. 2000e-2(e)(2) was added to the statute by floor amendment; its legislative history is limited and does not change our understanding of the meaning of the term "religious curriculum." Representative Purcell offered the amendment and stated it was "limited to church affiliated colleges and universities, part of whose mission . . . is to propagate the belief of the denomination that is supporting that educational institution." 110 Cong.Rec. 2585-86 (Feb. 8, 1964), *reprinted in* EEOC, *Legislative History of Titles VII and XI of Civil Rights Act of 1964* 3198 (1968). Representative Roush declared such a school "should have the right to compel the individuals it employs to adhere to its beliefs, for that [school] exists to propagate and to extend to the people with whom it has influence its convictions and beliefs." *Id.* at 2587, *Legislative History* at 3201. Representative Edmondson indicated the exemption was intended to apply to "a college that is dedicated primarily to the propagation of its faith." *Id.* at 2590, *Legislative History* at 3206. Although these comments do not address the meaning or scope of the curriculum exemption directly, they are consistent with our conclusion that Congress did not anticipate schools that disavow any effort to instill particular

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[12] Webster's Ninth New Collegiate Dictionary (1990) defines "curriculum" as "the courses offered by an educational institution" or "a set of courses constituting an area of specialization." The Oxford English Dictionary (2d ed. 1989) defines it as "a regular course of study or training, as at a school or university." Webster's defines "propagate" as, "to cause to spread out and affect a greater number or greater area." The Oxford English Dictionary defines it as, "To extend . . . To spread from person to person, or from place to place; to disseminate, diffuse."

religious beliefs in their students would come within the exemption.

There is no case law on the curriculum exemption. EEOC has interpreted the provision in only one ruling, EEOC decision 75-186, *reprinted in* 1983 EEOC Decisions ¶ 6553. This decision rested primarily on the ground the school involved was wholly owned, supported, controlled, and managed by a church and therefore was expressly exempt under § 2000e-2(e)(2) whether or not it also fell within the curriculum exemption.[13] The opinion's limited references to the curriculum exemption are not inconsistent with our own understanding that application of this exemption is to be determined by an essentially fact-based inquiry into the extent to which a school's curriculum reflects an effort to spread and inculcate particular religious beliefs.

As we have noted, the curriculum of the Schools has little to do with propagating Protestantism, especially in grades 7-12. Seventh and eighth grade students study the nature of religious belief and the tenets of major faiths, and high school students take a one quarter course exploring the interrelationship of western religions and Hawaiian culture, but efforts to propagate Protestantism are not evident in this or any other coursework or in required activities of the Schools. Courses *about* religion and a general effort to teach good values do not constitute a curriculum that propagates religion, especially in view of the Schools' express disclaimer of any effort to convert their non-Protestant students. The Schools' publications demonstrate religion is more a part of the general tradition of the Schools than a part of their mission, and serves primarily as a means for advancing moral values in the context of a general education.

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[13] 42 U.S.C. § 2000e-2(e)(2) also provides an exemption for religious discrimination by an educational institution that is "in whole or substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society." The Schools do not contend they come within this exemption.

IV. *Bona Fide Occupational Qualification.*

The district court concluded that adherence to the Protestant faith was a bona fide occupational requirement for teaching at the Schools and therefore the Schools were exempt under § 2000e-2(e)(1).[14]

EEOC and the Schools stipulated there is nothing "specific about the subject matter of any given teacher position . . . that would make a teacher being Protestant a bona fide occupational qualification" [BFOQ].[15] EEOC claims this stipulation is dispositive in light of the holding in *U.A.W. v. Johnson Controls, Inc.*, —— U.S. ——, 111 S.Ct. 1196, 113 L.Ed2d 158 (1991), that to qualify as a BFOQ a discriminatory job qualification must "affect an employee's ability to do the job," and "must relate to the 'essence' or to the 'central mission of the employer's business.'" *Id.* —— U.S. at ——, 111 S.Ct. at 1205 (citations omitted). The Protestant-only requirement,

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[14] 42 U.S.C. § 2000e-2(e)(1) reads in part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [] religion . . . in those certain circumstances where religion . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

[15] The stipulation reads:

> [The Schools] contend[] that the Will of Mrs. Bishop by its language creates a bona fide occupational qualification for all teachers to be of the Protestant religion in order that there be a Protestant presence at Kamehameha Schools. [The Schools are] not contending that, apart from their status as teachers generally, there is anything specific about the subject matter of any given teacher position (such as English, science, mathematics) . . . that would make a teacher being Protestant a bona fide occupational qualification within the meaning of this exemption.

EEOC concedes that being Protestant is a bona fide occupational qualification for the Chaplain, Associate Chaplain, and religious education teachers.

EEOC argues, has no relationship to a teacher's ability to perform the job of teaching secular subjects—in this case, the French language.

The district court held the requirement related to the teachers' ability to perform their job because "the essence or central mission of [the Schools] is to provide native Hawaiians with an education from the Protestant point of view . . . . Similarly, the essence or central mission of the teachers' jobs is to provide that viewpoint." 780 F.Supp. at 1323. The district court defined the central mission of the Schools too narrowly. The record demonstrates the Schools have embraced a broad mandate to help native Hawaiians "participate in contemporary society for a rewarding and productive life" by providing a solid education in traditional secular subjects, instruction in Hawaiian culture and history, and the moral guidance necessary to help students "[d]efine a system of values." [16] The requirement of Protestant affiliation in a teacher's past is largely irrelevant to this mission. There is no basis in the record for concluding a nominally Protestant teacher will provide superior instruction or serve as a better moral guide to students. *See Johnson Controls*, —— U.S. at ——, 111 S.Ct. at 1205 (employer must show "a high correlation" between a qualification and ability to perform job functions).

Except for the Schools' religious education teachers (as to whom Protestant affiliation is conceded to be a BFOQ), teachers at the Schools provide instruction in traditional secular subjects in the traditional secular way. There is nothing to suggest that adherence to the Protestant faith is essential to the performance of this job. Teachers in kindergarten through eighth grade lead their

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[16] This description of the Schools' purpose is consistent with Mrs. Bishop's desire that the Schools "provide first and chiefly a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women." *See* note 1, *supra*.

classes in prayer, but there is no evidence the Schools review the content of the prayer for conformity to Protestant doctrine or that non-Protestants are not qualified to lead students in prayer. The Schools also expect teachers to serve as role models and provide general instruction in morals, but they do not review or inquire into their teachers' personal religious life or general moral principles, and do not inquire whether the teachers integrate Protestantism into their teaching. The Schools identify no skills or aptitudes which persons affiliated with the Protestant tradition possess as a class that are essential to the performance of those job functions. Moreover, the record indicates the Protestant affiliation requirement is nominal —if a prospective teacher represents he or she is Protestant, the prospective teacher is presumed able to lead prayers and serve as a moral role model.[17]

The Schools rely on the Seventh Circuit's decision in *Pime v. Loyola Univ. of Chicago*, 803 F.2d 351 (7th Cir. 1986), a case decided before *Johnson Controls*, to argue the Protestant-only requirement relates to the "essence" of the Schools because it is necessary to creation of a "Protestant presence" on campus. The district court agreed, holding "the 'Protestant presence' is significant to the educational and normal operation" of the Schools. 780 F.Supp. at 1321.

EEOC contends *Pime* is inconsistent with *Johnson Controls*. Even if *Pime* were an accurate statement of the law in light of *Johnson Controls*, however, it could not bear the weight the Schools would have it carry. *Pime* approved a Jesuit "presence" of four positions in the Philosophy Department of Loyola University, a school with "a long Jesuit tradition" and a largely Catholic student body.

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[17] The Schools do not apply the Protestant-only requirement to teachers in programs receiving federal funding, although the source of funding has no apparent relationship to the qualities required to teach such courses.

Id. at 352. The court focused on the tradition and character of the school and the desire of administrators " 'that students would *occasionally* encounter a Jesuit.' " *Id.* at 354 (emphasis added). The court stated it was "wholly reasonable to believe that the educational experience at Loyola would be different if a Jesuit presence were not maintained." *Id.*

In this case, the Schools will have a Protestant "presence" equal to or greater than the Jesuit "presence" at Loyola even if the proportion of Protestants on the faculty falls well below one hundred percent, and there is no indication the educational experience at the Schools will be any different if some of the teachers are not Protestants. Moreover, the Schools seek to retain a wholly Protestant faculty at a school whose student body has a majority of non-Protestant students and whose tradition and character is rooted more in Hawaiian history and culture than in specific principles of Protestantism.

The fact that the Protestant-only requirement appears in Mrs. Bishop's will cannot in itself alter the result. *Cf. Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1225-26 (9th Cir.1971) (compliance with state law does not transform a discriminatory practice into a BFOQ). The will does not establish a religious school, nor stipulate any relevant qualifications Protestant teachers would bring to teaching positions at the Schools. The will suggests only that Mrs. Bishop was stating a personal preference based on her own experience in missionary schools. This kind of personal preference is not a BFOQ when expressed by a living employer, and there is no reason to reach a different conclusion because the preference is expressed posthumously.[18]

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[18] We also reject the suggestion that Mrs. Bishop's will creates a BFOQ because failure to comply with its provisions may violate Hawaii law and void the trust. Hawaii courts approved the merger

Reversed and remanded for entry of partial summary judgment in favor of EEOC. Each side will bear its own costs of appeal.

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of the separate boys and girls schools established by the will because a change in circumstances warranted a departure from the will. *Collins v. Tavares*, 37 Haw. 109 (1945); *see also Murray v. Kobayashi*, 50 Haw. 104, 106, 431 P.2d 940 (1967) ("Mrs. Bishop did not direct the trustees to establish religious schools"). These cases suggest Hawaii courts would also approve an involuntary departure from the Protestant-only requirement to comply with Title VII.

APPENDIX B

UNITED STATES DISTRICT COURT
D. HAWAII

Civ. No. 90-539 ACK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

KAMEHAMEHA SCHOOLS/BISHOP ESTATE,
Defendant.

Aug. 1, 1991

John de Pemberton, Jr., Stephen Passek, E.E.O.C., San Francisco Dist. Office, San Francisco, Cal., for plaintiff.

Watanabe Ing & Kawashima, James Kawashima, Cynthia Winegar, Colleen I. Wong, Sr. Counsel, Kamehameha Schools/Bishop Estate Legal Dept., Honolulu, Hawaii, for defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

KAY, Chief Judge.

I. INTRODUCTION

EEOC and Kamehameha Schools/Bishop Estate (KSBE) bring motions for summary judgment. For the following reasons, the court grants KSBE's motion and denies EEOC's motion.

II. FACTS

The will of Bernice Pauahi Bishop established Kamehameha schools. The will required that teachers at the school be Protestants. Carole Edgerton responded to an advertisement offering a teaching position at KSBE. She was told of the religious qualification. She was not Protestant. She filed a charge of discrimination with EEOC. EEOC found that Edgerton was discriminated against on the basis of her religion which was in violation of Title VII of the Civil Rights Act of 1964. EEOC attempted to conciliate the matter with KSBE but was told that KSBE could not do so because of the directive in Mrs. Bishop's will. EEOC then filed this lawsuit. Both parties have filed motions for summary judgment on the issue of whether KSBE is exempt from Title VII's prohibition against hiring based on religion. Both parties have agreed that the scope of this lawsuit is limited strictly to the kindergarten through twelfth grade teaching positions at the Kamehameha Schools (exclusive of the adjunct schools at other sites).

III. DISCUSSION

A. SUMMARY JUDGMENT STANDARD

Summary judgment shall be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). One of the principal purposes of the summary judgment procedure is to identify and dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Summary judgment must be granted against a party who fails to demonstrate facts to establish an element essential to his case where that party will bear the burden of proof of that essential element at trial. *Id.* at 322, 106 S.Ct. at 2552.

> If the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact, the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment.

T.W. Electrical. Serv. v. Pacific Elec. Contractors Assoc., 809 F.2d 626, 630 (9th Cir. 1987) (citations omitted). Instead, Rule 56(e) requires that the nonmoving party set forth, by affidavit or as otherwise provided in Rule 56, " '*specific facts* showing that there is a genuine issue for trial.' " *Id.* (quoting Fed.R.Civ.P. 56(e)) (emphasis in original). At least some " 'significant probative evidence tending to support the complaint' " must be produced. *Id.* (quoting *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968)). Legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir.1978), *cert. denied*, 440 U.S. 981, 99 S.Ct. 1790, 60 L.Ed.2d 241 (1979).

The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. *See Eisenberg v. Ins. Co. of North America*, 815 F.2d 1285, 1289 (9th Cir.1987) (citing, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986)). Thus, the question is whether "reasonable minds could differ as to the import of the evidence." *Id.*

The Ninth Circuit has established that "[n]o longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir.1987),

cert. denied, 484 U.S. 1006, 108 S.Ct. 698, 98 L.Ed.2d 650 (1988). Moreover, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (footnote omitted). Indeed, "if the factual context makes the non-moving party's claim *implausible,* that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Franciscan Ceramics,* 818 F.2d at 1468 (emphasis in original) (citing, *Matsushita,* 475 U.S. at 587, 106 S.Ct. at 1356.). Of course, all evidence and inferences to be drawn therefrom must be construed in the light most favorable to the nonmoving party. *T.W. Elec. Service,* 809 F.2d at 630-31.

B. THE MERITS

This lawsuit arises out of a provision in the will of Mrs. Bishop. It provides that:

> I give, devise and bequeath all of the rest, residue and remainder of my estate . . . unto the trustees below named . . . to hold upon the following trusts, namely: to erect and maintain . . . schools . . . called the Kamehameha Schools. . . . I desire my trustees to provide first and chiefly a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women; and I desire instruction in the higher branches to be subsidiary to the foregoing objects. . . . I also direct that the teachers of said schools shall forever be persons of the Protestant religion, but I do not intend that the choice should be restricted to persons of any particular sect of Protestants.

Mrs. Bishop's will, ¶ 13 (exhibit 1 of Winegar affidavit filed April 5, 1991.)

KSBE apparently concedes that the "Protestant-only" hiring requirement is discriminatory and otherwise would be in violation of the Civil Rights Act of 1964;[1] however, KSBE argues that its "Protestant-only" hiring requirement is exempted from the Civil Rights Act under three code sections. 42 U.S.C. § 2000e-2(e)(1); 42 U.S.C. § 2000e-1; and 42 U.S.C. § 2000e-2(e)(2).

1. Bona Fide Occupational Qualification; 42 U.S.C. § 2000e-2(e)(1)

Section 703(e)(1) of Title VII of the Civil Rights Act of 1964 is codified at 42 U.S.C. § 2000e-2(e)(1) and provides that

> it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion . . . in those certain instances where religion . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

EEOC argues that the "Protestant-only" hiring requirement for teachers is not a bona fide occupational qualification (BFOQ) within the meaning of Section 703(e)(1).[2] KSBE argues that it is.

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[1] Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), states that:

> [i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire . . . any individual, or otherwise to discriminate against any individual with respect to . . . employment, because of such individual's . . . religion. . . .

[2] EEOC concedes, however, the requirement is bona fide as to those teaching positions at the school where the teachers actually are teaching a religion class, or to the positions of chaplin (sic) and associate chaplain. *See* "stipulation regarding 'BFOQ' affirmative defense."

"The BFOQ defense is written narrowly, and this Court has read it narrowly." *International Union UAW v. Johnson Controls,* —— U.S. ——, *111 S.Ct. 1196, 1204, 113* L.Ed.2d 158 (1991) (sex discrimination); *see also Dothard v. Rawlinson,* 433 U.S. 321, 334, 97 S.Ct. 2720, 2729, 53 L.Ed.2d 786, (1977) (sex discrimination); *Rasul v. District of Columbia,* 680 F.Supp. 436, 440 (D.D.C.1988) (religious discrimination); *Kern v. Dynaelectron Corp.,* 577 F.Supp. 1196, 1199 (N.D.Tex.1983), *aff'd,* 746 F.2d 810 (5th Cir.1984) (religious discrimination).[3] "[I]n order to qualify as a BFOQ, a job qualification must relate to the 'essence' or to the 'central mission of the employer's business.'" *Johnson Controls,* 111 S.Ct. at 1205. The Court, in examining the language of the BFOQ exception, noted that it suggested that discrimination "must relate to ability to perform the duties of the job." *Id.* at 1206.[4]

The parties prepared a stipulation regarding this exemption. The stipulation provides "the KS BE contends that the Will of Mrs. Bishop by its language creates a [BFOQ] for all teachers to be of the Protestant religion in order that there be a Protestant presence" at the

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[3] *Kern* noted that the "plain language" of the BFOQ exception, which applies equally to sex and religious discrimination, makes caselaw discussing the BFOQ exception in the context of sexual discrimination equally relevant and applicable to religious discrimination. 577 F.Supp. at 1199.

[4] The Statute thus limits the situations in which discrimination is permissible to "certain instances" where . . . discrimination is "reasonably necessary" to the "normal operation" of the "particular" business. Each of these terms—certain, normal, particular—prevents the use of general subjective standards and favors an objective, verifiable requirement. But the most telling term is "occupational"; this indicates that these objective, verifiable requirements must concern job-related skills and aptitudes.

111 S.Ct. at 1204.

schools. *See* Stipulation regarding BFOQ affirmative defense, at ¶ 2a. The stipulation further provides that

> KS/BE is not contending that, apart from their status as teachers generally, there is anything specific about the subject matter of any given teacher position (such as English, science, mathematics) . . . that would make a teacher being Protestant a [BFOQ] within the meaning of this exemption.

Id.

The court construes the stipulation to mean that, although there is not anything specific within the subject matter of the teachers' position (i.e., math, English, science, etc.) that would justify limiting teachers to Protestants, there is nothing within the stipulation that would prohibit the court from finding that a "Protestant presence" or Protestant perspective was a valid BFOQ based on their status as teachers generally and under the will of Mrs. Bishop. It was the understanding of the court, based on the hearing, that the parties concurred that this was the proper interpretation of the stipulation.

KSBE contends that a "Protestant presence" at the school is a valid BFOQ because such presence is important to the successful operation of the schools. KSBE relies on *Pime v. Loyola University of Chicago*, 803 F.2d 351 (7th Cir.1986), for this proposition.

In *Pime*, the Seventh Circuit held that Loyola University's decision to seek Jesuit philosophy professors because it wanted a "Jesuit presence" on campus was not a violation of Title VII. The court held that such a qualification was a valid BFOQ.

Loyola University had a long Jesuit tradition. Until 1970, it was governed by an all-Jesuit board of trustees. In 1970, the bylaws were amended allowing nearly two-thirds of the trustees to be non-Jesuits. In 1986, 93% of the academic administrators, and 94% of the teaching staff were non-Jesuit. About 75% of Loyola's students

came from Catholic backgrounds. In 1978, Pime was a part-time philosophy professor at Loyola who was Jewish. The philosophy department consisted of 31 professors, 4 of which were Jesuits. The university had three full-time teaching positions in its philosophy department to fill. The University decided that it wanted to fill the 3 positions with Jesuits. Pime applied for and was rejected for the position. He sued.

The court held that the

> Jesuit "presence" is important to the successful operation of the university. It appears to be significant to the educational tradition and character of the institution that students be assured a degree of contact with teachers who have received the training and accepted the obligations which are essential to membership in the Society of Jesus. It requires more to be a Jesuit than just adherence to the Catholic faith, and it seems wholly reasonable to believe that the educational experience at Loyola would be different if Jesuit presence were not maintained. . . . One witness expressed the objective as keeping a presence "so that students would occasionally encounter a Jesuit."
>
> It is true that it has not been shown that Jesuit training is a superior academic qualification, applying objective criteria, to teach the particular courses. It is also true that in looking at claims for BFOQ, courts have considered only the content of the particular job at issue. [citation] Yet it seems to us that here the evidence supports the more general proposition that having a Jesuit presence in the Philosophy faculty is "reasonably necessary to the normal operation" of the enterprise, and that fixing the number at seven out of 31 is a reasonable determination.

803 F.2d at 353-54. The *Pime* court's test to determine whether a BFOQ is valid rests on a finding that the "pres-

ence" was significant to the educational tradition and character of the institution, and that it would be reasonable to believe that the educational experience would be different if the presence were not maintained.

Applying the *Pime* test, it is clear that the "Protestant presence" is significant to the educational tradition and normal operation of KSBE. The will founding the school mandated that the teachers be Protestant. Mrs. Bishop's will, ¶ 13. For the entire life of the school, teachers have been Protestant. Joint stipulation as to facts, ¶ 37. Moreover, the trustees of KSBE have been exclusively Protestant. *Id.*, ¶ 27.

The "Protestant presence" is also significant to the educational character of KSBE. David Kaupu, chaplin at KSBE, states that he believes that "the curriculum of the Schools is directed toward the propagation of the Protestant religion." KSBE motion, affidavit of David Kaupu, at 2; *see also* affidavit of David Kaupu filed May 20, 1991, ¶ 2. KSBE has mandatory religious education requirements covering, *inter alia*, Protestant Christianity. Winegar affidavit, exhibit 7.21 ("Ekalesia" syllabus). Students must pass the religious education classes in order to advance and graudate from the schools. KSBE Motion, affidavit of David Kaupu, ¶¶ 11-12; affidavit of David Kaupu filed May 20, 1991, ¶¶ 3-6.

Finally, KSBE illustrates a good example of how, if the Protestant-only requirement were not maintained, it would be reasonable to believe that the educational experience would be significantly different. KSBE refers to the practice at the schools where the K through 8 teachers lead their classes in daily prayer. KSBE hypothecates the probable scenario of a non-Protestant teacher refusing to lead the class in prayer. Such a situation would definitely change the educational experience at KSBE.

Application of the *Pime* test indicates that the Protestant-only requirement is valid.

EEOC argues that the case at bar is distinguishable from *Pime*. EEOC notes that *Pime* was a situation addressing the issue of whether a Jesuit-only requirement was valid when a Jesuit university wanted to hire Jesuits for only 7 of 31 teaching positions. In this case, EEOC points out, KSBE wants to use the BFOQ for *all* teaching positions at issue. KSBE rebuts this by correctly pointing out that it is not atypical for BFOQs to apply to a class as a whole. *See Dothard, supra* (women prison guards in "contact" positions).

EEOC also argues that *Pime* should not be followed for the reasons cited by Judge Posner in a concurring opinion in *Pime*. 803 F.2d at 354-58. Those reasons were that the majority opinion should not have reached the BFOQ issue because the BFOQ did not really involve religion, and that there was an inadequate factual record.

The court declines to reject *Pime* on the basis of Judge Posner's arguments. In essence, Judge Posner argued that there was no religious BFOQ involved because Jesuits do not qualify as a religion. This argument is unpersuasive because Loyola was looking to hire persons with certain religious backgrounds. Therefore, it is clear that a religious BFOQ was involved. As to the lack of an adequate record, Judge Posner concluded the record was inadequate to address a different issue—not the issue of a BFOQ.

Moreover, application of the *Johnson Controls* test, the Supreme Court's latest word on BFOQs, indicates that the Protestant-only hiring requirement is a valid BFOQ. *Johnson Controls* asked whether a job qualification was related to the essence or central mission of the employer's business.

EEOC argues that the Protestant-only requirement is not related to the "essence" of KSBE and the teachers' jobs. EEOC argues that the essence of KSBE's business is education, and not religion. To support its point

EEOC points to the case of *Collins v. Tavares,* 37 Haw. 109, 111 (1945), which EEOC claims is dispositive of the main purpose of KSBE—education.

The court rejects EEOC's reading of *Collins.* It does not lead to the conclusion that KSBE's main purpose is educational as distingiushed from educational with a Protestant perspective. The court reads *Collins* to simply mean that coeducation, as opposed to non-coeducation, was desirable and in accord with efficiently administering the estate and carrying out Mrs. Bishop's intent.

EEOC also claims that the educational essence of KSBE is demonstrated by the fact that the schools admit children of all religions and does not attempt to convert anyone to Protestantism. Further proof, EEOC contends, is found in the fact that KSBE does not require students or teachers to become members of the schools' church (Bishop Memorial Church), as well as the facts that there are no student members at Bishop Memorial Church, no Protestant church has authority over KSBE, the schools' chaplin has no authority over the non-religious curriculum, many educational programs contain no explicit religious content, and KSBE receives federal funds. KSBE points out that in *Pime* many of the same factors existed.

KSBE makes a statement in its opposition to EEOC's motion that merits additional discussion. KSBE states that "it is not inconsistent for [KSBE] to be an educational institution for native Hawaiians as well as a religious educational institution." KSBE's opposition to EEOC's motion, at 36.

Undoubtedly. KSBE has a strong Protestant influence on the standards over and above the religious persuasion of its teachers. KSBE has submitted various documents that support this finding. *See* Winegar affidavit, exhibits 1-9 (school handbooks, brochures, reports, etc. noting religious orientation of schools). Moreover, KSBE has an on-campus church, mandatory devotion times, manda-

tory religious education, and daily prayer. While Mrs. Bishop intended KSBE to provide education to native Hawaiians, she also wanted them instructed in "morals" and wanted the instruction to come from Protestants. Mrs. Bishop's will, ¶ 13. If one takes the intent of Mrs. Bishop, as expressed in her will, and considers how that intent has manifested itself in terms of the religious atmosphere existing at KSBE today, the inescapable conclusion is that the purpose of the schools is to provide native Hawaiian children with an education from someone who has experienced and presumably has a Protestant point of view.

It is evident that Bernice Pauahi Bishop, who had made the decision to "adopt the children of her people and make them her heirs" and who by her will founded Kamehameha Schools for her adopted children, earnestly intended and provided in her will that her adopted children as students at Kamehameha Schools would receive the same benefits of being taught by Protestant teachers with a Protestant perspective in their teachings as she had experienced herself in her school days at the Chief's Children's School, where she received religious and moral training for some ten years under the tutelage of Protestant missionaries. See joint stipulation as to facts ¶¶ 9-12. Beginning with her years as a student/boarder at the Chief's Children's School and continuing throughout her adult life, Mrs. Bishop attended the Kawaiahao Church on a regular basis, taught Sunday School and sang in the sanctuary choir. *Id.*, ¶ 15. This court finds that this intent of Mrs. Bishop has been implemented and fulfilled at Kamehameha Schools (*see* discussion *infra* under section 2).

Further, this Court finds that teachers by their presence and daily contact with students serve as role models and instruct them in morals. The President of Kamehameha Schools averred, "that the teachers' role is one of teaching by example and precept, by letting their exposure to

the Protestant tradition and its value system be something they, in turn by background, would bring to their students." Affidavit of Michael Chun, President of Kamehameha Schools.

Paragraph 72 of the Joint Stipulation as to facts shows that roughly ⅓ of the students at the Kamehameha Schools are Protestants, while a little over ⅓ are memof other religions. Although paragraph 73 states that the Schools do not have as a specific purpose the conversion of their non-Protestant students, providing a Protestant presence and perspective affords an out-reach and positive Protestant influence upon these other students. The arrangements also exposes the Protestant students to non-Protestant peers while under the protective influence of Protestant teachers. Mrs. Bishop adopted all of the children of her people and her will did not place any limitation on their religious affiliation.

The court concludes that the essence or central mission of KSBE is to provide native Hawaiians with an education from the Protestant point of view. Because the teachers are required to be Protestant in order to provide a Protestant viewpoint, the requirement that the teachers be Protestant is "reasonably necessary to the normal operation of" KSBE. 42 U.S.C. § 2000e-2(e)(1). Similarly, the essence or central mission of the teachers' jobs is to provide that viewpoint. A Protestant would be best qualified to teach such a viewpoint. The Protestant-only requirement "relate[s] to [the teachers'] ability to perform the duties of the job." *Johnson Controls,* 111 S.Ct. at 1206. In addition, a Protestant-only requirement relates to the "essence" or "central mission" of KSBE's business—providing education from the Protestant perspective. *Id.* at 1205.

The court finds that the "Protestant-only" hiring requirement is a valid BFOQ and exempts KSBE from Title VII.

2. Exempt Religious Organization; 42 U.S.C. § 2000e-1

Section 702 of Title VII, codified at 42 U.S.C. § 2000e-1, provides that

> [t]his subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

KSBE claims it is an exempt religious organization under this section. EEOC disputes this.

"Congress's conception of the scope of section 702 was not a broad one. All assumed that only those institutions with extremely close ties to organized religions would be covered. Churches, and entities similar to churches, were the paradigm." *E.E.O.C. v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir.1988), *cert. denied*, 489 U.S. 1077, 109 S.Ct. 1527, 103 L.Ed.2d 832 (1989). The case law is not very helpful because most cases deal with defendants that are clearly religious associations within the meaning of section 702. *Id.* "[T]he central function of section 702 has been to exempt churches, synagogues, and the like, and organizations closely affiliated with those entities." *Id.* (footnote omitted).

The Ninth Circuit was reluctant to define the scope of section 702 and noted that when determining whether an organization is exempt under section 702, "each case must turn on its own facts." *Id.* "All significant religious and secular characteristic must be weighed to determine whether the corporation's purpose and character are primarily religious. Only when that is the case will the corporation be able to avail itself of the exemption." *Id.* (footnote omitted). Thus, the court is required to en-

gage in a balancing test to determine whether KSBE is exempt.[5]

KSBE presents the following facts to support its assertion that its purpose and character are primarily religous:

(1) All trustees for the 104-year life of the schools have been Protestant;

(2) Mrs. Bishop desired for the children to be instructed in morals by Protestants;

(3) The Hawaii Supreme Court, in *Murray v. Kobayashi,* 50 Haw. 104, 431 P.2d 940 (1967), held that KSBE is operated in connection and is affiliated with the Bishop Memorial Church. The Court in *Murray* interpreted Mrs. Bishop's will to be "permeated with expressions of her interest in the exposition of the Protestant religion [and] [i]n recognition of this interest the trustees established the Bishop Memorial Church as an integral part of [KSBE] and injected religion in the school program. [¶] A review of the record clearly shows that [KSBE] and Bishop Memorial Church are operated by the trustees in

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[5] EEOC claims that this court should not engage in the *Townley* balancing test because Congress specifically provided a formula for determining when a religious educational institution is exempt in section 703(e)(2) of the Civil Rights Act. *See* 42 U.S.C. § 2000e-2(e)(2). There is no authority cited for this proposition. While 703(e)(2) addresses "religious schools," likewise section 702 specifically addresses "educational institutions." Although EEOC argues that KSBE is an educational institution, the result of EEOC's reasoning is that KSBE may not be examined under section 702 to determine whether it qualifies for an exemption as an educational institution which meets the conditions of that statute. In any event, the court declines to accept EEOC's invitation and analyzes whether KSBE is exempt under *Townley*'s section 702 balancing test because section 702 specifically applies to "educational institutions." 42 U.S.C. § 2000e-1. The court will analyze KSBE under section 703(e)(2) below.

connection with one another." 50 Haw. at 106, 431 P.2d 940;

(4) EEOC issued, in the past in the *Puette* case, a no cause determination regarding the Kamehameha schools in the same Protestant-only requirement (Winegar affidavit, exhibits 3-5);

(5) In the *Puette* case, EEOC adopted the Hawaii Department of Labor's finding that KSBE's Protestant-only requirement was exempted under section 702 and Hawaii law (*Id.*, exhibit 4);

(6) KSBE refers to itself as a Protestant school (KSBE's opposition to EEOC's motion, Wong affidavit, exhibit B (advertisement by KSBE for substitute teacher position giving rise to this litigation whether KSBE refers to itself as "A Non-Denominational Protestant School.")));

(7) KSBE is a non-profit institution;

(8) There has been an unbroken chain of over 100 years of mandatory devotional services, religious education requirements, and prayers at KSBE; and

(9) EEOC found in its determination in the underlying claim that KSBE has a "religious orientation similar to that found in most church-schools." (KSBE opposition to EEOC's motion, Wong affidavit, exhibit C, p. 7 n. 8).

EEOC presents the following facts to show secular characteristics that would support its claim that KSBE's primary purpose is educational and not religious:

(1) Neither Mrs. Bishop's will nor the "Mission Statement" make reference to KSBE as a "religious" school;

(2) The non-profit status of KSBE is based on its being charitable and educational—not religious;

(3) KSBE is involved in land management and portfolio investments (referring to the portion of the trust which manages the assets of the trust);

(4) KSBE impliedly holds itself out as a secular institution by applying for and receiving federal funds;

(5) KSBE is owned, controlled, and supported by a secular estate; and

(6) The Protestant-only requirement is not a tenet of the Protestant faith.

EEOC's cited secular characteristics do not tip the balance in its favor. Several factors that it cites require discussion. For example, its reference to the failure to mention KSBE as religious schools in the will and mission statement as indicative of a secular purpose is contradicted by the Hawaii Supreme Court's decision in *Murray*, EEOC's own admission that KSBE's religious orientation is similar to many other church schools, and the preponderance of evidence submitted by KSBE showing otherwise (Winegar affidavit, exhibits 1-9).

Second, KSBE points out that its non-profit status (charitable and educational basis and not religious) is because of an Internal Revenue Code determination and therefore is non-determinative and irrelevant on whether it could be exempt as a religious organization under section 702. KSBE's argument has merit as " 'most church-related schools are chartered under the general corporation statutes as nonprofit institutions for the purpose of education.' " *Pime*, 803 F.2d at 358 (Posner, J., concurring).

Third, the fact that KSBE's is involved in land management and portfolio investments is irrelevant because the focus of this lawsuit is hiring for the kindergarten through twelfth grade teaching positions at the schools. The inquiry is directed at whether the schools, and not Bishop

estate in the aggregate, is a religious organization within the meaning of section 702.

Fourth, the fact that KSBE receives federal funds does not necessarily indicate that it is not religious. Federal funding is not used in studies taught by teachers hired under the "Protestant-only" provision of the Mrs. Bishop's will. Joint stipulation as to facts ¶ 40. It seems to the court that it is a matter of judicial notice that many religious organizations receive state and federal funding.

Fifth, the fact that a Protestant-only requirement is not a tenet of the Protestant faith does not comport with the *Townley* requirement to look at the characteristics of the employer. This factor (Protestant-only requirement is a tenet of the Protestant faith) looks at the Protestant faith and not at KSBE. Further, if this factor were relevant to determining whether an organization was exempt under section 702, it would seem that many religious educational organizations would lose on this point.

The court notes KSBE is owned, controlled, and supported by a secular estate; although all of the trustees of the estate must be Protestant pursuant to Mrs. Bishop's will. In fact, as EEOC points out, KSBE is really anomalous in that the typical religious organization is owned, supported, and/or controlled by a church. Here, KSBE owns, supports, and controls the Bishop Memorial Church. This fact is indeed unique to the cases involving religious organizations.

After reviewing all the above factors, the court concludes the evidence weighs in favor of finding that KSBE has a religious purpose and character under the *Townley* balancing test.

Indeed, the President of Kamehameha Schools averred that the "daily contact with Protestant role models, prayer before meals, devotionals, required religious courses, the Bishop Memorial Church and Chapel on campus, religious programs of the school, deputation

teams, and religious extra-curricular activities all speak to the degree to which religion plays a role at Kamahameha." Affidavit of Michael Chun, President of Kamehameha Schools.

The Kamehameha Schools Planning Survey conducted in 1961 by Booz, Allen and Hamilton, Management Consultants, found that, "[i]t appears that, as a devout Christian, Mrs. Bishop believed that young people attending the Kamehameha Schools would benefit from living and learning in an environment that would provide a positive Christian emphasis." Winegar affidavit, exhibit 7.4. At page 56 the Survey found that, "a second important purpose of the preparatory department is to provide a Protestant Christian setting for the education of young children. The purpose is clearly reflected in the program, which includes time for formal study of Christian religion, devotional services, a daily 'quiet time' at the opening of school and other features clearly consistent with this kind of objective." At page 107 of Volume 2 the report concluded, "Kamehameha Schools strive today to educate their students in a Protestant Christian environment and to prepare them for lives as useful and self-sufficient citizens and leaders." At page 27 of Volume 3 the Survey noted that "the objectives of the religious services sponsored by the Kamehameha Schools are to provide a Protestant Christian atmosphere which pervades every aspect of campus life, to encourage worship, to engender an understanding and appreciation of the heritage afforded by Christianity, to provide opportunities for Christian service to others, and to give personal counselling—all for purposes of helping students to shape themselves into persons of good moral character."

The court finds that KSBE is a "religious educational institution" within the meaning of section 702 of the Civil Rights Act and is exempt from Title VII.

3. Exemption Based on Curriculum Directed Toward Propagation of a Religion; 42 U.S.C. § 2000e-2(e)(2)

Section 703(e)(2) of Title VII, codified at 42 U.S.C. § 2000e-2(e)(2), provides that

> it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or substantial part, owned, supported, controlled, or managed by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

The parties have cited no case law explaining the operation of this section. The court has found none in its research. The only authority cited by either party which directly addresses this issue is EEOC Decision 75-186.

EEOC correctly notes that section 703(e)(2) contains two alternative exemptions. The first part of the statute grants an exemption if the school is owned, supported, controlled, or managed by a particular religious corporation, association, or society. The second part grants an exemption if the curriculum of the school is directed toward the propagation of a particular religion. KSBE argues it is exempt under the second exemption of this section.

EEOC claims that KSBE does not propagate the Protestant faith in its education because it does not meet the level of "propagation" required by section 703(e)(2). EEOC cites to *E.E.O.C. v. Southwestern Bap. Theological Seminary,* 651 F.2d 277 (5th Cir. Unit A 1981) as

the appropriate standard to be used in deciding if a school has met section 703(e)(2)'s "propagation" requirement.

EEOC's reliance on *Southwestern Bap.* is misplaced. The case did not consider section 703(e)(2) but rather a completely unrelated matter. The court finds that the more logical standard to use is the one found in EEOC Decision 75-186.

In Decision 75-186, the EEOC held that a school was exempt from Title VII under section 702 and both exemptions contained in section 703(e)(2). *See* EEOC decision 75-186, at p. 4357. EEOC noted in decision 75-186, "that although religion is not taught as a separate subject, it is an integral part of the child's daily life at school." *Id.* at 4356.

The court notes that the facts and analysis in decision 75-186 are somewhat sparse with respect to the "propagation" exemption. However, the court gleans the following conclusion from decision 75-186: If religion is an "integral part" of the child's daily life at school, then the school propagates religion within the meaning of section 703(e)(2). The court finds that this "integral part" test for determining whether a school propagates a particular religion seems reasonable and proper. Thus the court will apply it to KSBE in order to determine if it propagates a particular religion.

KSBE points to a number of facts that illustrate the propagation of the Protestant faith at KSBE. *See* KSBE's motion, at 39-42.[6]

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[6] KSBE points to the following facts: KSBE is wholly supported, controlled and managed by Protestant trustees; the trustees also operate and control Bishop Memorial Church; the Bishop Memorial Church is operated on the campus of KSBE; the curriculum is directed toward the propagation of the Protestant religion (citing affidavit of David Kaupu); mandatory Sunday chapel attendance for boarders and weekly chapel attendance for all students has been required for over 104 years; required prayer before all meals (with the exception of cafeteria meals for grades 9-12); required religious education for 104 years; certain students are taught by

EEOC responds by pointing to facts that it claims show the absence of religion. EEOC claims that KSBE's catalogs are without reference to religion, thus illustrating the non-propagation of religion at KSBE. EEOC's motion, at 42. KSBE rebuts by directing the court to a KSBE catalog stating that "[r]eligion is an important part of the educational program." Winegar affidavit, exhibit 7.16, at 10. The court notes that there are also numer-

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either Christian Education teachers or ordained Protestant ministers; teachers of kindergarten through eighth grade lead their classes in daily prayer before the noon meal; other school events involve prayer (i.e., other meals, athletic events, commencement ceremonies, song festivals); school publications contain religiously-oriented material; and the school encourages and sponsors participation by students in religious organizations. As noted before, the Hawaii Supreme Court, in *Murray*, interpreted Mrs. Bishop's will to be "permeated with expressions of her interest in the exposition of the Protestant religion [and] [i]n recognition of this interest the trustees established the Bishop Memorial Church as an integral part of [KSBE] and injected religion in the school program. [¶] A review of the record clearly shows that [KSBE] and Bishop Memorial Church are operated by the trustees in connection with one another." 50 Haw. at 106, 431 P.2d 940. To support this finding the *Murray* Court cited to the following "uncontroverted evidence" found by the trial judge which is similar to the evidence in this case:

> "The trustees have brought religion into the Schools with: (1) five minutes of daily devotions at the beginning of each school day; (2) a prayer before each meal at Schools; (3) compulsory Sunday Chapel attendance for all boarding students; (4) religious teaching by homeroom teachers in kindergarten and the first and second grades; (5) teaching of religion by Christian Education teachers for 30 or 40 minutes once a week in grades third through eighth; (6) talks by the Chaplin or Assistant Chaplin to classes on religious aspects or allusions in subjects such as science, literature and social studies, in grades ninth through twelfth, about fifty times per year; (7) Sunday School for seventh and eighth grade students; and (8) voluntary student activity in connection with the school Chapel or religious or quasi-religious organizations at the Schools."

Id. at 106 n. 3, 431 P.2d 940.

ous other similar references in school literature. *See e.g.*, exhibit 7.1, at C-7, C-8 (Introduction pamphlet to KSBE); exhibit 7.11, at 10 (KSBE student handbook).

EEOC points to other KSBE publications it claims illustrate a lack of propagation. *See* EEOC's motion, at 42-43. EEOC's use of school literature to prove its point is unavailing. EEOC selects portions of the schools' publications that do not refer to religion to make its point. These contentions must fail in light of the fact that the KSBE publications are replete with references to religion. *See generally*, Winegar affidavit, exhibits 1-9.

EEOC also seems to argue that the lack of a concerted effort to convert non-Protestants by KSBE is indicative of non-propagation. However, the Protestant presence and perspective in teaching affords an outreach and exposure to spread the Protestant religion to the non-Protestant students. More importantly, the curriculum nurtures and develops the religious beliefs of the Protestant students.

EEOC also claims there is a lack of propagation illustrated by the fact that KSBE does not monitor whether its teachers have integrated the tenets of Protestantism into their work and lives.[7] It is likely there would be an expressed public outrage if KSBE was to look over the shoulders of its teachers and supervise their daily lives. Moreover, the argument misses the mark in the inquiry under section 703(e)(2). The court should be looking

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[7] The joint stipulation, however, does provide that prior to April 1988, KSBE required all teachers, at the time of hire, to provide KSBE with either a copy of a baptismal record or a letter from their minister attesting to their membership with a Protestant church. Subsequent to April 1988, KSBE required all new teachers subject to the Protestant-only hiring requirement to sign a certification statement attesting his/her membership in the Protestant religion at the time of hire. The certification provided that upon KSBE's request the teacher must provide a baptismal record or letter from a minister attesting to the teacher's membership in the Protestant religion.

at the curriculum, not the teachers' personal lives to determine whether the schools propagate religion. In any event, the foregoing evidence that the school is involved in the propagation of religion negatives (sic) any possible inference that KSBE's refraining from monitoring teachers' activities indicates the non-propagation of religion.

Based on the evidence adduced by the parties, it is clear that "religion . . . is an integral part of the child's daily life at" KSBE, EEOC Decision 75-186, at 4356, and that, "the School's curriculum 'is directed toward the propagation of a particular religion,' i.e., [Protestant] Christianity." *Id.* KSBE is exempt from Title VII under the "propagation" prong of section 763(e)(2). An indication of the Kamehameha Schools fruitfulness in fulfilling the directive of Mrs. Bishop in her will to provide "instruction in morals and in such useful knowledge as may tend to make good and industrious men and women" through teachers of the Protestant religion is shown by the fact that some 14 Protestant ministers who graduated from the Kamehameha Schools participated in the dedication service of the Bernice Pauahi Bishop Memorial Chapel on April 3, 1988. Winegar affidavit, exhibit 7.8. In addition, EEOC found in its determination in the underlying claim that KSBE has a "religious orientation similar to that found in most church-schools." (KSBE opposition to EEOC's motion, Wong affidavit, exhibit C, p. 7 n. 8).

IV. CONCLUSION

The court grants KSBE's motion for summary judgment. The court finds that KSBE is exempted from Title VII under 42 U.S.C. § 2000e-2(e)(1), 42 U.S.C. § 2000e-1, and 42 U.S.C. § 2000e-2(e)(2). Accordingly, EEOC's motion for summary judgment is denied.

APPENDIX C

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
San Francisco, California 90143

Charge No. 370-89-0539

Carole Edgerton
94-1056 Mahua Place
Waipahu, Hawaii, 96797 Charging Party

Kamehameha Schools Bishop Estate
c/o Legal Department
Kawaiaha'o Plaza
567 South King Street, Suite 328
P.O. Box 3466
Honolulu, Hawaii 96801 Respondents

DETERMINATION

I issue the following determination on the merits of this charge.

Respondent is an employer within the meaning of Title VII of the 1964 Civil Rights Act, as amended. 42 U.S.C. § 2000e, *et seq.*, ("Title VII"). Timeliness, deferral and all other procedural requirements for coverage have been met.

Charging Party alleges that she was denied consideration for hire for "Substitute Teacher" positions because of her religion, non-Protestant.

Respondent does not deny that Charging Party made a telephone inquiry on or about February 1, 1989, regarding Respondent's advertised vacancies for "Substitute Teachers", and that Charging Party was told of Respond-

ent's policy of giving preference to Protestants for teaching positions. Respondent states that Charging Party made no further inquiry after this inquiry and this assertion is not in dispute.

Respondent admits that it is the policy and practice of the Kamehameha Schools/Bernice Pauahi Bishop Estate (hereinafter "Schools" unless otherwise specified) in the hiring of teachers and faculty, who have direct contact with the students at the Schools, to give preference to members of the Protestant religion. Respondent explains that this policy and practice is based upon the express written directives of Mrs. Bernice Pauahi Bishop, founder of the Schools, as stated in her Last Will and Testament, and adopted by the Trustees of her Estate.[1] Respondent states that all teachers hired by the Schools pursuant to this policy and practice have been Protestant.

It is beyond dispute that Respondent's policy and practice of hiring only Protestants violate Title VII, unless they fall within one of the exemptions in Title VII. Respondent contends that its policy and practice do not violate Title VII because of the three religion exemptions contained in the statute, all of which apply to the Schools, according to Respondent. The applicability of each of these three exemptions to the Schools will be discussed in turn.

1. *Section 702*—This section states that Title VII "shall not apply to a religious corporation, association,

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[1] The language of the Will relied on by Respondent is as follows: "I desire my trustees to provide first and chiefly a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women; and I desire instruction in the higher branches to be subsidiary to the foregoing objects. . . ." I also direct that the teachers of said schools shall forever be persons of the Protestant religion . . . (Article Thirteenth, Will of Bernice Pauahi Bishop, dated October 31, 1883).

educational institution, or society with respect to the employment of individuals of a particular religion. . . ." [2]

The first step in the analysis of a claim for a statutory exemption to a remedial statute, such as the Section 702 exemption to Title VII, must begin with the axiom of statutory construction that such exemptions must be narrowly construed. That axiom must be applied here. The exemption can be granted to Respondent only to the extent clearly articulated by Congress, since the exemption allows conduct which would otherwise be unlawful employment discrimination.

The Ninth Circuit Court of Appeals in *EEOC* v. *Townley Engineering & Manufacturing Co.*, 859 F.2d 610 (9th Cir. 1988) reviewed the relevant legislative history and concluded that the 702 exemption "was not a broad one". *Id.* at 618. Congress "assumed that only those institutions with extremely close ties to organized religions would be covered. Churches, and entities similar to churches, were the paradigm." *Ibid.*

In EEOC Decision No. 75-186, February 21, 1975, *EEOC Decisions* [CCH] 6553 (1983), the Commission found that the 702 exemption applied to a Christian school that was "created and established, and is wholly owned, supported, controlled and managed by the Church".

In *EEOC* v. *Mississippi College*, 626 F.2d 477 (5th Cir. 1980) the exemption was applied where defendant proved that it was owned and operated by the convention

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[2] Because this Determination relies on legislative history regarding the interplay between 702 and 703(e)(2), it is necessary for a proper understanding of the legislative intent as to the 702 exemption to quote 702 as it existed at the time of the legislative debate. The original 702 stated in relevant part as follows: "This title shall not apply to . . . a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association or society of its religious activities . . ."

of Southern Baptist Churches. Similarly in *EEOC* v. *S.W. Baptist Theological Seminary,* 651 F. 2d 277 (1981) the exemption was applied where the defendant proved that it was owned, operated and controlled by a convention of Baptist churches, and the seminary itself is entitled to the status of "church". *Id.* at 283. The exemption was also applied in *Feldstein* v. *Christian Science Monitor,* 555 F.Supp. 974 (D. Mass. 1983) where defendant was found to be directly accountable to the Board of Directors of the Church. The court found that the Monitor is "merely a department of the First Church of Christ, Scientist" and is "operated exclusively for religious purposes." *Id.* at 978.

During the course of legislative debate on a proposed amendment to Title VII, which would ultimately become § 703(e)(2) [the 3rd religion exemption in Title VII], the scope of the Section 702 exemption was discussed. "The consensus was that organizations were not covered under § 702 if they were merely 'affiliated' with a religious organization." *EEOC* v. *Townley Engineering & Manufacturing Co., supra,* 859 F.2d at 617.[3]

The second step in the analysis of Respondent's claimed 702 exemption, which would allow it to discriminate based on religion, is to look at the institution to determine whether it is a "religious" institution within the scope of the 702 exemption contemplated by Congress, as discussed above.

In its position statement filed with the Commission Respondent states that the Kamehameha Schools are "charitable and *educational* organizations (emphasis supplied) and are operated and controlled by the Trustees

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[3] On the other hand, a church-supported organization "would 'unquestionably' be exempt under Section 702 if it were 'wholly owned' by the religious order." *EEOC* v. *Townley Engineering & Co.*; *supra,* 859 F.2d at 617 fn. 10, citing remarks by Rep. Roosevelt during the floor debate on Title VII.

of the Bernice Pauahi Bishop Estate.[4] Thus the Schools are not churches, or institutions like churches, and are not owned, operated or controlled by a church or religion.[5] Consequently, the Schools do not fit within the paradigm of a "religious" institution contemplated by Congress in granting the 702 exemption to Title VII.

Respondent relies heavily on the Bishop Will to support its claim that the Schools are "religious". Contrary to Respondent's assertion, the plain words of the Will do not create a religious institution but an educational institution with a primary focus on "morals". The fact that the will also uses the word "religion" with regard to the employment of teachers indicates the testator was capable of stating a religious requirement when she so intended. If Mrs. Bishop had wanted to create "religious" schools she could well have stated that instruction should be "religious" or there should be instruction in the Protestant religion. The only religious requirement set forth in the Will is for the *employment of teachers.* It is noted that Codicil No. 2 to the Will, para. 4th, indicates as follows:

> I also direct that said trustees shall have power to determine to what extent said school [*i.e.*, the school for boys] shall be industrial, mechanical or agricultural.

The testator's explicit reference to the type of curricula contemplated for the school for boys and the absence of any indication whatsoever that the curriculum be "religious" is noteworthy.

Finally, it is necessary to look at the relationship of the Schools to the "Bishop Memorial Church of the Kahe-

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[4] Respondent does not contend that the Bernice Pauahi Bishop Estate is a "religious" entity.

[5] Although the Trustees of the Bishop Estate are required by the Will to be Protestant, that fact does not make the school "religious". See *Fike* v. *United Methodist Children's Home of Virginia,* 547 F. Supp. 286, 290 (1982).

hameha Schools" (hereinafter "Church"). This Church is a distinct entity from the Schools, is not referenced in the Bishop Will and was created years after the Schools were created. The Church's original By-Laws (1908) and its Amended By-Laws (1969) indicate that "the government of this church is vested in the body of believers who compose it, acting through the church committee, insofar as its actions *do not interfere with the authority of the Trustees of these Schools.*" (Article III, Section 1). (emphasis supplied). Thus, unlike the legal authority authorizing the 702 exemption cited above, the Schools are not a church or an institution like a church; nor are the Schools, owned, operated or controlled by a church or religious body; the Schools are at best affiliated with the above-referenced Church but not subject to its control. The School's authority is, in fact, explicitly protected from any control by the Church or by the Church's own By-Laws.

For all of the above reasons, I conclude that the Schools are not "religious" within the meaning of the Section 702 exemption to Title VII for "religious" institutions.[6]

2. *Section 703(e)(1)*—The second religion exemption in Title VII states as follows:

> (e) Notwithstanding any other provision of this title (1) it shall not be an unlawful employment practice

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[6] There is one additional reason which supports this conclusion. Congress provided a definition for a "religious educational institution" in Section 703(e)(2) but not for Section 702. The legislative history indicates that the 703(e)(2) exemption is narrower but *more leniently drawn* than the Section 702 exemption. See *e.g., Fike* v. *United Methodist Children's Home of Virginia, supra,* 547 F.Supp. at 290 fn. 3. Since Respondent in this case clearly does not fit within the more generous 703(e)(2) exemption (see discussion at pp. 6-8, below), it would be improper for this Agency to interpret the 702 exemption to provide an educational institution with a bigger loophole to Title VII coverage than was contemplated by Congress in 703(e)(2).

> for an employer to hire and employ employees . . . on the basis of his religion . . . in those instances where religion . . . is a bona-fide occupational qualification reasonably necessary to do the normal operation of that particular business enterprise.

In this case Respondent claims that being Protestant is a bona-fide occupational qualification ("bfoq") for the position of "teacher" regardless of the subject matter to be taught.

The Supreme Court has ruled that the bfoq "was in fact meant to be an extremely narrow exception." *Dothard* v. *Rawlinson,* 433 U.S. 321, 334 (1977). In looking at claims of bfoq courts have considered only the content of the particular job at issue. *Trans World Airlines* v. *Thurston,* 469 U.S. 111, 122 (1985). Here there is nothing in the content of the generic teacher position that requires each and every teacher to be Protestant to carry out the teaching operation of the Schools.[7] It is understandable that Respondent should claim in this case every religion exemption available under Title VII, including the bfoq, as they are required by the mandate of the Bishop Will to give preference in employment to Protestants. The Commission's obligation, however, is to test this employment requirement by the bfoq standard incorporated by Congress in the statute and by the applicable case law.

The bfoq exemption for religion was granted in *Kern* v. *Dynalectron Corp.,* 577 F. Supp. 1196 (N.D. Tex. 1983). In that case the bfoq was found necessary for all helicopter pilots stationed in Jeddah, Saudi Arabia, to be Moslem. Under the laws of that country, based on the tenets of Islamic religion, non-Moslems were prohibited from entering the holy area of Mecca under penalty of

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[7] If Respondent were to narrow the claimed bfoq exemption to teacher positions involving religion, the result may well be different.

death. Helicopter pilots stationed in Jeddah were regularly required to fly over the holy area of Mecca. Thus the bfoq was necessary.

Based on the applicable law and the evidence of record I conclude that Respondent has not met its burden of showing that being Protestant is reasonably necessary to the performance of each and every teacher position at the Kamehemeha Schools.

3. *Section 703(e)(2)*—The third religion exemption in Title VII states as follows:

> (e) Notwithstanding any other provision of this Title . . . (2) it shall not be an unlawful employment practice for a school . . . to hire and employ persons of a particular religion if such school . . . is, in whole or in substantial part, owned, supported, controlled or managed by a particular religion or by a particular religious corporation, association or society, or if the curriculum of such school . . . is directed toward the propagation of a particular religion.

This 703(e)(2) exemption must, like all exemptions to remedial statutes, be narrowly construed, since it authorizes conduct which would otherwise be unlawful.

The first half of the 703(e)(2) exemption exempts schools which are "owned, supported, controlled or managed by a particular religion or . . . religious corporation. As indicated above, the Schools are not owned, supported or controlled or managed by a particular religion or religious corporation but instead by a non-religious, individual estate. Respondent does not contend that the Bishop Estate is a religious entity. It is also not contended that the Schools are controlled by the Kamehameha Church, or any other religious body. Thus the

Kamehameha Schools are not "religious" within the meaning set forth by Congress in this portion of 703(e)(2).[8]

The second half of the 703(e)(2) exemption exempts schools where the "curriculum of such school . . . is directed towards the propagation of a particular religion."

It is undisputed that the Bishop Will created an employment preference for the Protestant religion. Even though this preference does not specify a single denomination, Protestantism can be easily construed to be a "particular religion" within the meaning of 703(e)(2). The critical question here for purpose of this exemption, however, is whether the curriculum of the Kamehameha Schools is directed toward the propagation of Protestantism.

After inspection of the curricula for the Kamehameha Schools for the last several years, it is determined that the curricula is primarily secular with a small percentage devoted to religion. This is clearly not a case such as *EEOC* v. *S.W. Baptist Theological Seminary, supra,* where the curriculum of the seminary was devoted to the teaching of future ministers and the propagation of the Baptist religion.

For the reasons stated above, I find that Respondent has not satisfied either the first or second half of the 703(e)(2) exemption.

Because none of the three religion exemptions contained in Title VII are applicable to the Kamehameha Schools, I find reasonable cause to believe that Respondent's policy and practice of hiring only Protestants for

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[8] It is clear from the evidence submitted during the investigation of this charge that the schools have a religious orientation that is similar to that found in most church-schools. However, Congress defined "religious" educational institutions in 703(e)(2) the way it did and chose not to include secular schools that included some religious activities in its curriculum.

teacher positions at the Kamehameha Schools is violative of Title VII.

Finally, it is noted that the Hawaii Supreme Court has concluded that the Schools' hiring preference based on religion does not violate the Hawaii fair employment law. *Murray* v. *Kobayashi,* 50 Haw. 104 (1967). This contrary conclusion does not detract from the conclusion reached in this Determination but instead points up the difference between the federal and state statutes.

The Hawaii statute, Section 90A-8(e) Revised Laws of Hawaii ("RLH"), is different than Title VII's religion exemptions in one critical aspect. This difference in statutory provisions explains for the most part the different results reached as to the Kamehameha Schools' religious hiring preference. Section 90A-8(c) R.L.H. states as follows:

> Nothing contained in this part shall be deemed to . . . (e) prohibit or prevent any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by *or in connection with* a religious organization to promote the religious principles for which it is established or maintained. (emphasis supplied)

The Hawaii Supreme Court in *Kobayashi* relied specifically on the "in connection with" language of the state statute to grant the religious exemption to the Schools. *Murray* v. *Kobayashi, supra,* 50 Haw. at 106. It is the language that is not contained in Title VII, and consequently explains the different result under Title VII. In fact, it is noted that the *Kobayashi* court found that Mrs. Bishop "did not direct the Trustees to establish religious schools . . ." *Ibid.*

Having determined that there is a reasonable cause to believe that Respondent has engaged in an unlawful employment practice in violation of Title VII of the Civil

Rights Act of 1964, as amended, the Commission now invites the parties to join in a collective effort toward a just resolution of this matter. A representative of this office will be in contact with each party in the immediate future to begin the conciliation process.

On behalf of the Commission:

/s/ Charles Wong for
FRED BROOKS
Acting District Director

Date: December 28, 1989

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-16586

D.C. No. CV-90-00539-ACK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

KAMEHAMEHA SCHOOLS/BISHOP ESTATE,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Argued and Submitted
November 5, 1992—Honolulu, Hawaii

Filed March 31, 1993
Amended May 10, 1993

Before: James R. Browning, William A. Norris and
Stephen Reinhardt, Circuit Judges

Opinion by Judge Browning

ORDER

The opinion in this case, No. 91-16586, slip op. 3021 (9th Cir. March 31, 1993), is amended to add a new paragraph at the beginning of footnote seven, on page 3029:

> [7] The Schools maintain a cooperative relationship with the Bishop Memorial Church, which receives financial support from the Bishop Estate and is a member of the Hawaii Conference of the United Church of Christ. However, the Schools themselves are not affiliated with the Church of Christ, and the parties stipulated that no Protestant denomination, including the Church of Christ, "owns, supports, controls or manages, in whole or significant part, the Bishop Estate or the Kamehameha Schools."

With this amendment, the petition for rehearing is denied.